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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 15347

KENNETH BENDER, Farmer, Clinton, Ohio; H. H. BECKMAN, Farmer, Clay Center, Kan.; CLYDE F. SNODGRASS, Farmer, Muddy Creek Forks, Pa.; and ALFRED LINDAUER, Farmer, Chelsea, Mich.;

Plaintiffs,

vs.

CLAUDE R. WICKARD, Individually and as Secretary of Agriculture of the United States of America, Department of Agriculture Building, the Hall Between 12th Street and 14th Street, S. W., Washington, D. C.,

Defendant.

STATEMENT AS TO JURISDICTION ON APPEAL.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Kenneth Bender, H. H. Beckman, Clyde F. Snodgrass and Alfred Lindauer, Appellants herein, submit herewith their statement showing the bases of the jurisdiction of the Supreme Court on appeal.

a. Jurisdiction is conferred upon this Court to hear and determine the constitutional questions raised by this appeal, said authority and jurisdiction being founded upon the Act of Congress of August 14, 1937, Chapter 754, 50 Stat. 751.

b. The statutes of the United States, a construction of which is involved herein is the Act of Congress known and entitled as the Agricultural Adjustment Act of 1938, as amended, and Public Law No. 74, First Session, 77th Congress, approved May 26, 1941; also involved herein is the construction of the application of these provisions of the Constitution of the United States known and entitled as Article 1, Sections 1, 7, 8 and 9; Article 4, Section 2 and amendments to the Constitution, Articles 5 to 10, inclusive and also Article 13.

3. The decree sought to be reviewed was entered herein March 11, 1943, the Petition for Appeal was filed herein on March 18, 1943, and the Order Allowing Appeal was entered March 18, 1943.

d. The purpose of this action was and is to have decreed unconstitutional and invalid and ineffective the said Public Law No. 74 and the Sections 331 to 339, inclusive, of the Agricultural Adjustment Act relating to wheat quotas and control thereby of the amount of wheat planted and harvested and the disposition and sale thereof, as well as the use thereof by plaintiffs on their own premises in intrastate commerce and not in interstate commerce; as alleged in Plaintiffs' Complaint.

The action of the Lower Court was erroneous and prejudicial to the rights of plaintiffs in that said court, being a three-judge court, duly constituted under the statutes providing therefor, refused to permit plaintiffs to offer proof in regular hearing on the merits of their complaint, and held that the pleadings in the cause coupled with Plaintiffs' Offer of Proof presented no issues not heretofore decided by the United States Supreme Court in *Wickard* v. *Filburn*, 63 Supreme Court 82 and *Beckman, et al.*, v. *Mall, et al.*, 63 Supreme Court 199.

Plaintiffs say that there were presented by their Complaint and Offer of Proof, substantial, constitutional questions and that the final decree of the court dismissing their Complaint and thereby refusing to permit plaintiffs to put in their proof in support of the allegations of their complaint, raised specifically the question of a direct violation of their constitutional rights.

e. The questions presented are substantial and of great national importance and of vital importance to plaintiffs and many thousands of others, similarly situated. Said question particularly raises the issue: Whether or not the Agricultural Adjustment Act, and particularly Sections 331 to 339, inclusive, and Public Law No. 74, hereinabove referred to, are unconstitutional limitations upon the rights of plaintiffs as farmers and wheat growers and as Citizens of the United States.

f. The following cases sustain the jurisdiction of the Supreme Court to review the judgment of the District Court.

Church of the Holy Trinity v. *United States,* 143 U. S. 457;

Ozena v. *United States,* 260 U. S. 178;

Piedmont and Southern Railway Co. v. *Interstate Commerce Commission,* 268 U. S. 299 and

Sorrells v. *United States,* 287 U. S. 435.

A copy of the final judgment is appended hereto.

WILLIAM LEMKE,
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Attorneys for Plaintiffs.

March 18, 1943.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 15347

KENNETH BENDER, ET AL.,

Plaintiffs,

vs.

CLAUDE R. WICKARD, INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE OF THE UNITED STATES,

Defendant.

FINAL JUDGMENT.

The above-entitled cause having come on for hearing on January 21, 1943, before Associate Justice Henry White Edgerton of the United States Court of Appeals for the District of Columbia, Chief Justice Edward C. Eicher of the District Court of the United States for the District of Columbia and Associate Justice F. Dickinson Letts of the District Court of the United States for the District of Columbia, constituting a statutory three-judge court assembled pursuant to the provisions of Section 3 of the Act of August 24, 1937, as amended, and the court having considered the pleadings and the statement of the case presented by counsel for the plaintiff and having heard counsel for the respective parties in argument

NOW FINDS that the complaint presents no issue which has not been decided by the Supreme Court of the United

States in *Wickard* v. *Filburn*, 63 S. Ct. 82, and *Beckman, et al.* v. *Mall, et al.*, 63 S. Ct. 199, and the second and third defenses in the defendant's answer should be sustained. It is thereupon Adjudged, Ordered and Decreed, that:

(1) the order of this Court herein, dated January 28, 1943, be set aside;

(2) the complaint be, and it is hereby, dismissed;

(3) the written offer of proof tendered by the plaintiffs be filed with the clerk of the court as part of the record before this Court.

Done at Washington, D. C., this 11th day of March, 1943.

(S.) HENRY WHITE EDGERTON,
Associate Justice of the Court of Appeals for the District of Columbia.

(S.) EDWARD C. EICHER,
Chief Justice of the District Court of the United States for the District of Columbia.

(S.) F. DICKINSON LETTS,
Associate Justice of the District Court of the United States for the District of Columbia.

Approved as to form:

(S.) R. H. MCNEILL,
(S.) WM. LEMKE,
Attorneys for Plaintiffs.

(S.) JOHN S. L. YOST,
Special Assistant to the Attorney General;
Attorney for the Defendant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

Supreme Court, U
FILED
MAY 14 1943
CHARLES ELMORE CROP

No. 954

KENNETH BENDER, ET AL.,

Appellants,

vs.

CLAUDE R. WICKARD, ETC.,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

APPELLANT'S BRIEF IN OPPOSITION TO THE MOTION TO AFFIRM AND IN SUPPORT OF THE JURISDICTION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 954

KENNETH BENDER, ET AL.,

Appellants,

vs.

CLAUDE R. WICKARD, ETC.,

Appellee.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM AND IN SUPPORT OF JURISDICTION.

Action of the Lower Court.

In the above cause a three judge district court was convened in the District of Columbia in accordance with the Act of August 24, 1937. That Court refused to hear the evidence and denied the appellants the right to proceed and try the case on the merits. The Court took the position that all constitutional questions, *regardless of the facts,* had been disposed of by the Supreme Court's decision in the case of *Claude R. Wickard, etc.* v. *Roscoe C. Filburn,* 317 U. S. 111, and in the case of *Beckman, et al.,* v. *Mall,* 317 U. S. 597.

The appellants offered to prove that the facts in this case were just the opposite of the facts in the *Filburn* case

and that the rule of law applied in the *Filburn* case was estoppel and did not apply to their case.

The Court below granted the appellants' request and allowed them to file their Offer of Proof and then dismissed the case on the grounds that the Supreme Court had held Public Law 74 (77th Cong.) and Sections 331 to 339 inclusive of the Agricultural Adjustment Act of 1938 as amended *constitutional* in the *Filburn* case. The appellants here challenge the correctness of that conclusion and of the dismissal order.

The Court below also cited the *Beckman* case, 317 U. S. 597, as sustaining its Order of Dismissal. The Court erred. The *Beckman* case is no authority. That case was not before the Supreme Court on its merits. It was before the Court on a jurisdictional question. Upon the question whether the Secretary of Agriculture could be served by registered mail in a district not his official residence.

The record in that case outside of that part which related to service was not before the Supreme Court. It could not, therefore, have passed on the merits or demerits. Since the Supreme Court in the *Filburn* case, as we maintain, based its decision upon estoppel rather than upon constitutionality, therefore, the *Beckman* case is not in point.

Jurisdiction.

Jurisdiction is conferred upon this Court to hear and determine the constitutional questions raised by this appeal under Sections 1, 2 and 3 of the Act of August 24, 1937. Chapter 754, 50 Stat. 751.

Questions Involved.

There are only two questions involved in this case. One is: Did the Supreme Court hold Public Law 74 and Sections 331 to 339, inclusive, of the Agricultural Adjustment

Act, unconditionally constitutional in the *Filburn* case? This regardless of what the facts might be in any other case. We submit that it did not. We feel that the decision in the *Filburn* case is *based upon estoppel* rather than upon constitutionality.

The other question is: If the rule applied in the *Filburn* case is not applicable to the appellants' case, then, under the facts as established by the Offer of Proof, are not Public Law 74 and Sections 331 to 339, inclusive, of the Agricultural Adjustment Act unconstitutional? *Are they not repugnant not only to certain sections of the Constitution, but, to the Constitution as a whole?* Or in the alternate should this Court not send this case back to the District Court for trial on its merits?

Statement of the Case.

This case arises under Federal laws. It arises under Public Law 74 and Sections 331 to 339, inclusive, of the Agricultural Adjustment Act. The appellants are farmers from the States of Ohio, Kansas, Michigan, and Pennsylvania. Among other crops they planted winter wheat during the crop season of 1940 and 1941, *eight months before Public Law 74 was passed.*

Three of the appellants did not and did not intend to sell any of the wheat raised. They planted the wheat as a rotation crop and used it for family consumption, seed and feed for livestock. They had done this for years.

Not one of the appellants ever cooperated with the AAA program, *because to have done so would have meant a financial loss. None of the appellants ever received or accepted a subsidy or any other benefit from the AAA program. As taxpayers they were damaged by the AAA program—they helped to pay the cost of that program.* They were further injured by that program because it was used

by the government to depress prices. It placed a ceiling price and not a floor on agricultural products. See Offer of Proof, Appendix, pp. 44, 46, 50 and 53.

In the *Filburn* case this Court based its finding upon the erroneous stipulated statistical facts. It found that there was a surplus of wheat, that there was a lack of storage and that the domestic price of wheat because of the AAA program was $1.16 a bushel. While statistics do not falsify they sometimes mislead one in one-sided stipulations.

As we have already shown the domestic price of wheat during the period here in question was not $1.16 but 85 to 90 cents a bushel. The loan value was 98 cents. In the stipulation parity payments and soil conservation payments were added to the 98 cents. These together make about $1.16, but, parity and soil conservation payments were not a part of the price of wheat. The cooperator with the AAA program pays dearly in toil, expense and acreage reduction for these payments. They are not a charity. See Offer of Proof, Kennedy, Appendix, pp. 49-50.

Again the statistical stipulation tells us that our exports of wheat and flour diminished between the period of 1920 from 25 per cent of total production to less than 10 per cent in 1940. That is only a half truth. This decline was not due to over-production, but, was due to the fact that we had no wheat to sell or export. See Offer of Proof, Kennedy, Appendix, pp. 49-50.

During that period there was a general decline per capita of wheat available for world consumption. During the 8-year period from 1933 to 1940, inclusive, there was an accumulated deficit of wheat each year. During those 8 years we consumed more wheat than we produced. We imported more wheat and wheat substitutes than we exported. See Offer of Proof, Kennedy, Appendix, p. 42.

Again in his statistical stipulation the Secretary of Agriculture completely ignored the fact that while the increase

in the production of wheat from 1900-'4 period to 1935-'39 period was 16.6%, the increase in population for the same period was 62.9%. On the basis of an average per capita consumption rate of 3.7 bushels it required 208,100,000 bushels more wheat to feed our nation in 1940 than it required in 1900. See Offer of Proof, Kennedy, Appendix, p. 42.

The same is true in connection with the world increase in wheat and in population. It would seem that the Department of Agriculture is about 35 or 40 years behind the times in its computation of consumption and production of wheat. It assumes that the population has remained stationary since 1900. See Offer of Proof, Kennedy, Appendix, p. 42.

Under the provisions of Public Law 74 and Sections 331 to 339, inclusive, of the Agricultural Adjustment Act, and after a referendum vote, *in which less than ten per cent of the farmers of this nation participated,* the Secretary of Agriculture attempted to penalize the appellants 49 cents a bushel on so-called excess wheat *raised and consumed on their farms. He invaded their homes and informed them that they, their wives and children could not eat the bread made out of wheat produced on their own farms.* Under these circumstances the appellants asked for a restraining order in the District Court of the District of Columbia.

The Appellant, Beckman, is also damaged by these acts because his farm is not economically profitable for the production of corn or cultivated crops. These crops are damaged and destroyed by hot winds in July, August and September, while winter wheat matures before the hot winds arrive. If this appellant is compelled to comply with the AAA program, he will sustain a further loss of, at least, $2,000 because, then, one-third of his farm equipment suitable for raising wheat will become unnecessary. See Offer of Proof, Beckman, Appendix, p. 47.

Summary of Argument.

It is the contention of the appellants that in its decision in the *Filburn* case, this Court did not hold Public Law 74 or Sections 331 to 339 inclusive of the Agricultural Adjustment Act constitutional. While there is dictum in the opinion of the broad powers of Congress under the Interstate Commerce Clause, the Court nowhere says that the acts complained of are constitutional. It does hold that since Filburn received benefits from these acts he was in no position to complain. In other words, *he was estopped.* With that conclusion of the Court based upon an erroneous stipulation of facts the appellants find no fault.

While Filburn in his stipulation *erroneously* admitted that he had received benefits and higher prices for his wheat under the AAA program, the appellants in their Offer of Proof show conclusively that they never received or accepted, directly or indirectly, any subsidies or benefits from the AAA program. *They show conclusively,* in their Offer of Proof, *that as taxpayers they were damaged by the AAA program.*

The appellants show that as farmers the penalty of 49 cents a bushel on their so-called excess wheat is confiscation. They show that if applied to the facts *as given* in their Offer of Proof, Public Law 74 and Sections 331 to 339 inclusive of the Agricultural Adjustment Act not only violate the Due Process Clause, but, violate practically every section of the Constitution and the Constitution as a whole including the General Welfare Clause, and, in fact, do violence to the Interstate Commerce Clause itself.

The questions involved in this case are of great public concern and interest. They involve millions of dollars of penalties which we feel have been and are being unlawfully collected under an unconstitutional law. They are national in scope and affect the agricultural activities of millions

of farmers. They have endangered the nation's food supply.

Not a Moot Issue.

An aroused public sentiment has finally compelled the Secretary of Agriculture to suspend the operation of this unconstitutional law. But, unfortunately, the Secretary has not paid back the money that he collected under these illegal acts. He is still attempting to collect the penalty from the appellants and from the farmers who refused to pay. He holds that any farmer who used his own wheat for family consumption or fed it to his own livestock or poultry or otherwise disposed of it prior to his edict of February 23 will have to pay the penalty. Therefore, this is not a moot issue, it is a live issue and hundreds and thousands of farmers respectfully ask this Court to meet that issue squarely and to relieve them from these unconstitutional acts.

Argument.

This case arises under the Federal Constitution. It arises under the unconstitutional Public Law 74 and the unconstitutional Sections 331 to 339 inclusive of the Agricultural Adjustment Act of 1938 as amended. We say unconstitutional deliberately because not until black becomes white and white becomes black can these laws be held to come within the terms of the Interstate Commerce Clause. Stretch that Clause until its ribs crack and still there is no room within that Clause for these laws.

This Court concludes its decision in the *Filburn* case with this language: "That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law."

It is true that *under those circumstances* the Court did not give Filburn any relief. It did, however, not hold these laws constitutional. In that case Mr. Filburn permitted the Department of Agriculture to virtually stipulate him out of Court. He stipulated that, but for these laws the farmer would have received only 40 cents a bushel for his wheat, whereas because of them he received $1.16. This stipulation was incorrect and untrue at both ends.

The world market during the period that Mr. Filburn's and the appellants' wheat was raised was not 40 cents a bushel but considerably higher. It was around 62 cents a bushel at Winnipeg, an exporting country, and around 90 to 95 cents a bushel at Liverpool. The market price in the United States was around 85 cents a bushel, not $1.16. These laws did not raise the price of wheat, but, if anything, kept it down. See appellants' Offer of Proof, Appendix, pp. 45, 47, 48 and 49.

It is true that the opinion of the Court in that case contains questionable dictum, but the decision itself as we have seen disposes of the case by saying in substance that Mr. Filburn having received benefits under the act could not question its constitutionality.

The Court also says: "Whether the subject of the regulation in question was production, consumption, or marketing is, therefore, not material for purposes of deciding the question of Federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it.

"The same consideration might help in determining whether in the absence of congressional action it would be permissible for the State to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce.

"But even if appellants' activity be local though it may not be regarded as commerce, it may still, whatever its

nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as direct or indirect."

But that language was not necessary for the decision in the *Filburn* case. *He was estopped.* We do not believe all of the language in that decision is the matured judgment of the Court.

If that definition is accepted, then, the Court has rewritten the Interstate Commerce Clause to mean that Congress shall have power to regulate, control, restrict or destroy not only all the commerce between the States but all purely local commerce, production and consumption within a State. If that is constitutional, then, there is nothing to the Constitution except the Interstate Commerce Clause. All the rest is mere meaningless verbiage. That construction of the Interstate Commerce Clause is not sustained by any case cited in the opinion. It does violence to the plain English language which says: "Congress shall have the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The word "among" means commerce between States. It does not mean commerce within a State. "Among the several States" does not mean that Congress has the right to regulate the commerce within a State which is purely local. It surely does not mean that Congress can tell the farmer what he may eat and what he may not eat. Any decision of any court that holds to the contrary is an unconstitutional decision. These acts do not deal with interstate commerce, nor even with intrastate commerce, as such, but deal solely and exclusively with intrastate production of wheat and farming activities.

Their aim is, the control and curtailment of the production of wheat. They do not operate on interstate commerce, interstate dealers, or even on intrastate dealers, but aim

to control the farming activities of the farmer himself. They invade the rights of the State, by attempting to regulate its internal affairs; they invade the private home of the farmer within the State, by directing him as to what he may plant and what he may not plant; what he may produce, and what he may not produce.

If finally held constitutional, they will divide and set community against community, State against State, and section against section. They may be the rock upon which the sisterhood of forty-eight States will ultimately perish.

Violate Article 1, Section 8.

These laws are repugnant to Article 1, Section 8, in that they do not regulate commerce with foreign nations and among the several states, but in fact interfere with, hinder and tend to destroy commerce. We repeat that their object is not to regulate commerce, but to control intrastate production and intrastate farming activities. They curtail and restrict the production of an essential food product, wheat, to the detriment of the general welfare of the nation. They cannot be sustained as constitutional under any previous decision of this Court.

It must be clear that these acts do not only interfere with Interstate Commerce, but tend to destroy it. If I raise ten sheep and my family consumes five and I sell five, then there are five for intra or interstate commerce, but if I am compelled to reduce the number of sheep I raise to five, then I have destroyed the commerce in the other five, be it state or interstate.

It is equally clear that if I raise one hundred bushels of wheat and my family consumes fifty, that then I have fifty bushels for commerce, but if I am restricted to only fifty bushels, then I have none whatever for either state or interstate commerce. These facts are so self-evident that they need no further explanation.

"The Act invades the reserved right of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the Federal Government * * *.

From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the 10th amendment was adopted. The same proposition otherwise stated, is that powers not granted are prohibited. *None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.*" United States *v.* Butler, 297 U. S. 1. Linder *v.* United States, 268 U. S. 5. (Italics ours.)

"When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce. Brown *v.* Houston, 114 U. S. 622, 632, 633; Public Utilities Comm'n *v.* Landon, 249 U. S. 236, 245; Industrial-Association *v.* United States, 268 U. S. 64, 78, 79; Atlantic Coast Line *v.* Standard Oil Co., 275 U. S. 257, 267." Schechter Corp. *v.* United States, 295 U. S. 495.

If these acts are constitutional, then Congress can prohibit a person from making a single lead pencil and either using it himself, or giving it to his wife as a birthday present. Then Congress can direct the number of eggs that a hen is allowed to lay per week. It can compel the farmer to dispose of, or give to the Secretary of Agriculture, any hen

that lays more than three eggs per week. This, because some lead pencils and some eggs do enter interstate commerce.

If this law is constitutional, then Congress can prohibit any farmer from raising any wheat and using it for his own family and his own livestock. Absurd as this may seem, that is exactly what the Department of Agriculture is attempting to do under these acts. It is an attempt to penalize the farmer for raising wheat for seed, feed or for his family's consumption. It makes that a crime, which is a virtue, it attempts to penalize and punish the farmer for feeding the nation.

If this law is constitutional, then a farmer's wife who raises sheep, shears the wool from their backs, spins the wool on an old spinning wheel, knits the yarn into a sweater, can be told by Congress that she cannot wear the sweater, but that she must give it to the Secretary of Agriculture for nothing, or else she will be penalized. This because Congress wanted to keep up the price of sweaters to dealers outside of her home state.

If this law is constitutional, then Congress can prohibit a farmer with 10 children from milking and keeping more than 1 cow and if he keeps and milks 2, then the Government will have a lien on all the milk until he pays a penalty,—which amounts to confiscation,—to the Secretary of Agriculture. Then even the baby would have to go without milk because Congress under the dictum in the *Filburn* case could control all production and all consumption.

Counsel for appellants do not believe that this Court will allow Congress to annul the Constitution in the name of the Commerce Clause. It will not sustain this class of absurd and unconstitutional legislation. It will not confound interstate commerce with production and consumption. It will limit interstate commerce to articles of commerce and

to them only when they become part of interstate commerce or when they become part of intrastate commerce in such a way as to unreasonably discriminate or interfere with interstate commerce proper.

In fact these acts do not attempt to regulate interstate commerce. It is their purpose to curtail the production of domestic wheat. They attempt to bring about this result not by regulating interstate commerce, *but by controlling acres of production. Surely an acre of land cannot be made the subject of regulating interstate commerce. The acre itself does not walk across boundary lines.* It is true that some of its soil occasionally takes an interstate excursion in a dust storm, but as far as we know the Department of Agriculture has not yet been able to regulate that.

The case of *Mulford* v. *Smith*, 307 U. S. 38, does not sustain these laws. The question before the court there was quite different from the one here under consideration. *In that case, the farmer could sell all the tobacco he wanted, he could smoke all he wanted, publicly or privately, without interference or penalty.* While in the case here at bar, the farmer is not permitted to use the wheat he produces by his own labor, on his own farm, for any purpose whatsoever, until he pays the penalty. *He cannot sell it, he cannot give it away. He cannot feed it to his livestock, he cannot feed it to his poultry. He cannot grind it into flour and bake it into bread for himself and his family.*

> *"The statute does not purport to control production.* It sets no limit upon the acreage which may be planted or produced, and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce, the marketing warehouse. • • •
>
> The act did not prevent any producer from holding over the excess tobacco produced or processing or stor-

ing it for sale in a later year." Mulford *v.* Smith, 307 U. S. 38. (Italics ours.)

The Mulford case gives little comfort to those who would destroy constitutional government by invading the private homes of farmers, under the guise of regulating interstate commerce. *That case deals only with dealers in interstate commerce.* May we also suggest to the court that they read the dissenting opinion by Justice Butler, in that case. This will throw additional light on the majority opinion.

This Court has never sustained an act of Congress that attempted to prohibit the farmer from producing an essential food product or penalizing him for doing so. All acts sustained by the Court heretofore, except one, was where the regulation was that of interstate dealers, buyers and sellers. In the case of *United States* v. *Rock Royal Co-Operative,* 307 U. S. 533, the Court says:

"Each defendant is a dealer handling milk moving in interstate commerce."

The only exception to the above cases is the case of *United States* v. *Wrightwood Dairy Co.,* 86 Law. Ed. 431, but even in that case, however, much we may question its soundness, the act dealt solely and exclusively with intrastate dealers in milk. In that case the court virtually holds that the tail wags the dog. That forty per cent of interstate commerce control sixty per cent of intrastate commerce. If that is correct, then one-half of one per cent interstate commerce, could control ninety-nine and one-half per cent of intrastate commerce.

While we cannot follow that logic, yet that case does not decide the issues here. There it was not attempted to penalize the producer for milking a cow and drinking the milk, or letting the calf suck the cow; or even of milking the cow and giving it to his children. It did not attempt to make

that a crime. The aim was, to control the intrastate buyer, and the court concluded that he indirectly competed with interstate commerce and thereby affected the movement of *interstate commerce.*

The court in the *Filburn* case quotes with approval the following language in the *Wrightwood Dairy* case. 315 U. S. 110.

> "• • • The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. • • • It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a susbtantial way interfere with or obstruct the exercise of the granted power."

If that language means that Congress must stay within the constitutional granted power, we have no objection. *But, it also follows that no form of federal activity can constitutionally thwart the powers reserved to the states and the people.* Hence the reach of that power also extends to those federal activities which in a substantial way interfere with or obstruct the exercise of the reserved powers by the states and the people. This is a two-edged sword which must be respected alike by the Federal Government and the state governments. These sovereign powers must be equally respected and protected by the Federal and State Courts. (Italics ours.)

Again the Court cites with approval the opinion of Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheaton 1. But it fails to follow the principle of law laid down in that case.

In that case Chief Justice Marshall says: "It has, we believe, been universally admitted that these words comprehend every specie of *commercial intercourse* between the

United States and foreign nations." Remember he says commercial intercourse. Again he says: "*The completely internal commerce of a state then may be considered as reserved for the state itself.*"

The dictum in the *Filburn* case virtually says that it comprehends every specie of commercial intercourse not only between the states but within the states and all production and consumption. *A doctrine heretofore unheard of. A dangerous doctrine to constitutional government. In no decision heretofore has this Court ever used such constitution-annihilating dictum.* We are happy to say that this dictum is unsupported by any case cited in the Court's opinion.

Shreveport case, 234 U. S. 342:

The *Shreveport* case simply protected commerce between different states and prevented unjust discrimination by one state against the commerce of another state and it also protected domestic commerce from unfair competition from foreign nations.

The unjust discrimination consisted of the difference between the intrastate rates fixed by state law and the interstate rates fixed by the Interstate Commerce Commission. That is the direct opposite of what the laws here in question would do. These laws would give Congress the power to freeze the states into status quo. It would prevent the citizens of one state from competing with the citizens of another state.

Currin v. *Wallace*, 306 U. S. 1:

That case does not attempt to interfere with the production of any commodity. It simply applies to transactions involving the sale of tobacco at auction by persons engaged in the business of buying and selling tobacco *in interstate*

and foreign commerce. It deals with buyers and sellers engaged in interstate commerce and *not with producers.*

The *Minnesota rate* cases, 230 U. S. 352:

The *Minnesota rate* cases hold that intrastate commerce that is mingled with interstate commerce, comes under the control of the Federal Government, but the case expressly holds that the commerce that is confined within one state and does not effect other states, *is reserved to the state.*

> "The Commerce Clause while it has no limitations other than those prescribed in the Constitution, does not carry with it the right to destroy or impair those limitations and guaranties which are placed in the Constitution and amendments.
>
> "United States *v.* Joint-Traffic Association, 171 U. S. 505, 571 (1898). See also Monongahela Nav. Co. *v.* United States, 148 U. S. 312, 336 (1893); Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 479 (1894); Dayton-Goose Creek R. Co. *v.* United States, 263 U. S. 456 (1924); Greenleaf-Johnson Lumber Co. *v.* Garrison, 237 U. S. 251 (1915)."

> "Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment.
>
> "A. L. A. Schechter Poultry Corp. *v.* United States, 295 U. S. 490, 528 (1935), citing Ex parte Milligan, 4 Wall. 2, 120, 121 (1866); Home Bldg. & L. Asso. *v.* Blaisdell, 290 U. S. 398, 426 (1934)."

Labor Board v. *Fainblatt,* 306 U. S. 601:

Again the case of *Labor Board* v. *Fainblatt* deals with a labor dispute where it interferes with or threatens to obstruct shipments into interstate commerce. Again the

object of that legislation is to prevent articles produced by unfair labor practices from entering interstate commerce.

We also urge that none of the following cases support the present law's constitutionality.

Hammer v. *Dagenhart*, 247 U. S. 251:

That case has been overruled by more recent decisions and we think rightly so. But, that does not decide the issues in the case now at bar. We think the Federal Government has ample authority to exclude any article produced by child labor or slavery or any other article that is dangerous to the public health or welfare, but, it has no authority to tell a farmer what he may eat and what he may not eat.

United States v. *Darby*, 312 U. S. 100:

The case of *United States* v. *Darby* deals again with articles of commerce not as intrastate commerce but with articles when they enter into interstate commerce. It stops them at their inception and with that decision we find no fault. The trouble is that that case does not deal with intrastate activities but with intrastate articles of commerce and prohibits them from entering into interstate commerce under certain conditions effecting their production.

Swift and Company v. *United States*, 196 U. S. 375:

The case of *Swift and Company* v. *United States* is not an authority in the case at bar. That case again deals with interstate dealers in fresh meat. And it deals with a conspiracy to stifle interstate commerce and is clearly within the constitutional provision.

The same is true of the case of *United States* v. *E. C. Knight Co.*, 156 U. S. 13. That was another conspiracy to stifle interstate commerce. "Contracts to buy, sell, or exchange goods to be transported among the several States,

the transportation and its instrumentalities, and articles, bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce." In that case it is specifically stated "Contracts to buy, sell or exchange goods may be regulated but this is because they form part of interstate commerce."

Dahnke-Walker Company v. *Bondurant*, 257 U. S. 282, page 290:

The case of *Dahnke-Walker Company* v. *Bondurant*, 257 U. S. 282, simply holds that interstate commerce includes buying and selling for interstate, as well as the actual transportation. It has no bearing on the case at bar.

It is our contention that from the cases cited in the Filburn case that this Court can draw only one conclusion and that is that the Federal Government can no more tax or penalize the inhabitants of a state for producing an article than it can the inhabitants of a foreign nation. They control the article after it enters into commerce but not until then, and even then it can control it only after it has become interstate commerce or in cases where it is intrastate commerce but unreasonably and unjustly discriminates against interstate commerce. In the latter case the rule of reason should apply.

> "The extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation. The powers possessed by government to deal with a subject are *neither inordinately enlarged or greatly dwarfed because the power to regulate interstate commerce applies.*"
>
> *Wilson* v. *New*, 243 U. S. 332 (p. 346);
> *Hammer* v. *Dagenhart*, 247 U. S. 251.

Congress cannot legally annihilate the constitution—the fundamental law of the land—under the guise of proceeding

under the interstate commerce clause. We submit that both Congress and the courts have gone to the extreme limit in that direction. The time has arrived for the pendulum to return.

Not even the mistaken notions of necessity—or surpluses—of the Department of Agriculture can annul the constitution. The people alone can alter that instrument. It is not for Congress or the courts to amend the constitution by reading something into the interstate commerce clause that is not there.

> "Not event the changes of the remedy may be pressed so far as to cut down the security of a mortgage without *moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected.*"
>
> *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56.

The bounds of the whole constitution must be respected. *One part, or one clause, must not be used as an excuse to annihilate every other part of the instrument.* The constitution must be read, interpreted and upheld as a whole—the whole instrument is flexible to be sure, but it is not self destructive. *It does not contain the germ—a clause—for its own annihilation.*

Violate Article 1, Secs. 7 and 9.

If the penalty of 49c a bushel on so-called "excess wheat" is a tax, then, we submit, revenue bills must originate in the House of Representatives. Public Law No. 74, originated in the Senate. If it is a tax, then the money collected under it, should be paid into the general fund of the Treasury, and drawn out only by appropriations made by law.

If it is a penalty, as the act says it is, then it is an ex post facto law. In either case, it is unconstitutional. The constitution is our authority for that.

If Congress can punish a farmer for planting wheat eight months before the law is passed, by penalizing him, then it can also punish him by putting him in jail. The degree of punishment is in the discretion of Congress, but the Constitution says that these laws cannot be ex post facto. Neither can Congress make the planting of wheat, or farming operations, entirely within a state, an unlawful or criminal act. This is beyond its constitutional power.

Section 9, Article 1, of the Constitution further says:

> "No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another."

The purpose of this provision is clear. The framers of our Constitution prohibited Congress from giving one state preference over another. Each state is free to compete with every other state in industry, in agriculture, and in manufacture. As far as intrastate activities are concerned, no state can be limited, restrained, or discriminated against by the Federal Government.

Yet, the act here under consideration, would freeze production of wheat in each state. This, in accordance with its past production. It, in fact, says to the State of Vermont, and to other states: "You cannot, in the future, produce much wheat, because you have never produced much before. If Congress can do this, then it can do also the opposite, and say to the State of Kansas: "You have produced enough wheat in the past, you cannot produce it in the future."

If Congress can do this in the case of wheat, then it can do it with every other agricultural commodity, or manufactured article. Admit this doctrine, and constitutional government ceases to exist.

Violate Article 4, Section 2.

The acts here in question, violate Article 4, Section 2, in that they deny the citizens of each state all the privileges and immunities of citizens of the several states. They attempt to freeze a certain class of citizens in a certain business, farming, into a status quo. The citizens of each state have a right to compete with the citizens of every other state in the production of agricultural products. That right cannot be taken away from them, constitutionally, by Congress. The citizens of each state have a right to change their vocation, or occupation, from one to another within the state, without asking the Secretary of Agriculture for his permission. To hold otherwise, is to be intellectually dishonest with ourselves and with our form of government.

In the present case, the same result as prevailed prior to the Shreveport case—is the result this time, because of an act of Congress, which attempts to do the thing that the State of Texas was prohibited from doing—unjust discrimination between the different states.

In *Corfield* v. *Coryell*, 4 Wash. (U. S.) 371, 380, Mr. Justice Washington gave a general definition of the phrase which the courts have, without hesitation, accepted and followed. In his opinion he says: "The inquiry is, What are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several States which compose this Union. • • • What these fundamental principles are • • • may, however, be all comprehended under the following general heads: protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of

every kind, and to pursue and obtain happiness and safety, * * *

Violate Article 1, Section 1.

These laws, violate Article 1, Section 1, in that they give to the Secretary of Agriculture, legislative power. They give to him, power by rules and regulations, to make laws—to legislate. That power is vested in Congress alone.

> "Congress is not permitted by the Constitution to abdicate, or to transfer to others, the essential legislative functions with which it is vested. Art. I, S. 1; Art. I, S. 8, par. 18. Panama Refining Co. *v.* Ryan, 293 U. S. 388. P. 529."
>
> *A. L. A. Schechter Poultry Corp. et al.* v. *United States,* 295 U. S. 495.

Section 336 provides:

> "Between the date of issuance of any proclamation of any national marketing quota for wheat and June 10th, the Secretary shall conduct a referendum, by secret ballot, of farmers who will be subject to the quota specified therein, to determine whether such farmers favor or oppose such quota. * * *"

Congress fails to furnish the Secretary a yardstick as to what farmers are subject to the quota. *The Secretary ruled that only farmers who planted more than fifteen acres of wheat,* the previous year, had a right to vote. *Yet, many of these farmers,* who he denied the right to vote, he now attempts to penalize for planting excess acreage. (Italics ours.)

> "Congress is not permitted by the Constitution to abdicate or transfer to others, the essential legislative functions with which it is vested." Panama Rfg. Co. *v.* Ryan, 293 U. S. 388.
>
> "We pointed out, in the Panama Company case that the Constitution has never been regarded as denying

to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." Schechter Corp. *v.* United States, 295 U. S. 495.

Less than twenty per cent of the six million farm families plant wheat in a given year. It is not always the same farmer who plants wheat. Agriculture is in a constant flux. The kind of products grown by the individual farmer changes from year to year depending upon conditions far beyond the control of the Department of Agriculture.

The laws herein complained of attempt to give to a class, and to a small group of that class—less than one-tenth of all the farmers—the power to legislate, to put into operation a policy of restricting production of an essential food product—this by a referendum vote of that small group, and yet binding upon all of us. We submit that this is not a ministerial power, but a legislative power. A power that affects the entire nation.

If this can be done in the field of agriculture, it can be done in the field of manufacture—in all industry. Then Congress can delegate to any group the power to curtail production by a referendum vote. This in utter disregard of the welfare of the nation, or the want and suffering of the people. It can give to any group the power to penalize and imprison if its policy is not followed. Such a policy is a

total stranger to our constitution. It is foreign to "our way of life." It cannot be sustained.

Violate Article 5 of Amendments.

These acts violate Article 5 of amendments to the Constitution, in that they attempt to confiscate and deprive the plaintiffs of property without due process of law—without just compensation. Plaintiff's wheat, here in question, was planted eight months before Public Law No. 74 was passed. That law is not only unconstitutional, because it attempts to control production, but unconstitutional because it is retroactive. It attempts to make that a wrong, which is not a wrong; and attempts to do so in a retroactive manner.

It was held unconstitutional, as far as the 1941 crop is concerned, in the recent decision of the District Court of Ohio—in the case of *Roscoe C. Filburn* v. *Carl R. Helke,* but we submit it is wholly unconstitutional, and not only as to the 1941 crop. We insist that it does not only violate practically every section of the constitution, but violates the spirit and the letter of the entire constitution, including the general welfare clause.

Certainly the production of wheat, on one's own farm, entirely within one state, cannot be prohibited or controlled by a penalty tax, under any act of Congress. Yet that is the whole intent and purpose of the "penalty tax", in the acts here in question. It is true that an attempt is made to do this by subterfuge, by referring to interstate commerce. The farmer cannot be classified occupationally as a dealer in inter or intrastate commerce, or as a dealer in lottery tickets, or adulterated food, or white slave traffic, or stolen automobiles, or kidnapped persons. He is engaged in an honorable and lawful occupation—feeding the nation.

In the case of *Louisville Bank* v. *Radford,* 295 U. S. 555, Justice Brandeis said:

> "The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken

from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. * * * As we conclude that the Act as applied has done so, we must hold it void. *For the Fifth Amendent commands that however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation.*"

Violate Articles 7 and 8 of Amendments.

These acts violate Articles 7 and 8 of amendments of the Constitution, in that they attempt to deprive the plaintiffs of their property, *by placing a lien, not only upon the excess wheat, but upon all of the wheat produced during the crop year of* 1941. *This lien is not placed upon the crop after a trial by jury, but is placed thereon, in an arbitrary manner, by the statute, without trial and without an opportunity to be heard.*

The 49c penalty amounts to confiscation of the plaintiffs' wheat. At no time since 1930, have the farmers received cost of production for their wheat. From 1930 to 1940, they received from sixty-nine to seventy-five per cent parity prices. They fed the nation at a loss. They donated their services, and the services of their wives and children to the nation,—the honeyed words and the camouflage of the department notwithstanding. In place of giving them a one-hundred per cent parity, or cost of production, *Congress has been imposed upon, and gave them an unconstitutional penalty tax, and the two hundred sixty-five thousand Bellweathers on the payroll of the Department of Agriculture cannot continue to fool us.*

Violate Articles 9 and 10 of Amendments.

The acts here under consideration, violate Articles 9 and 10 of the amendments of the constitution; *with a boldness not heretofore attempted in any act of Congress, they attempt to*

usurp the power and rights expressly and absolutely retained by the people, and reserved to the states. If, under the guise of interstate commerce, Congress can go into the states and fine farmers for raising wheat under a law, eight months after the wheat had been planted, then the end of our constitution has arrived.

The reservation to the states respectively, only means the reservation of the rights of sovereignty, which they respectively possessed before the constitution of the United States, and which they had not parted from by that instrument. Any legislation by Congress, beyond the limits of the power delegated, would be trespassing upon the rights of the states or the people, and would not be the supreme law of the land, but null and void. *Gordon* v. *United States,* 117 U. S. 697. See also, *United States* v. *Williams,* 194 U. S. 295.

From *U. S.* v. *Butler,* 297 U. S. 1, p. 62 and 63, we quote:

> "The Constitution is the supreme law of the land, ordained and established by the people, and all legislation must conform to the principles it lays down." P. 62.
>
> "When an Act of Congress is appropriately challenged in a court, it is the duty of the court to compare it with the article of the Constitution which is invoked and decide whether it conforms to that article." P. 62.
>
> "The question in such cases is not what powers the Federal Government ought to have, but what powers have in fact been given it by the people." P. 63.

Also:

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effec-

tive exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced." *Linder* v. *United States*, 268 U. S. 5, 1, 17; *McCulloch* v. *Maryland*, 4 Wheat. 316, 423.

Also:

"But Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the States which affect interstate commerce only indirectly. Otherwise, in view of the multitude of indirect effects, Congress in its discretion could assume control of virtually all the activities of the people to the subversion of the fundamental principles of the Constitution. If the people desire to give Congress the power to regulate industries within the State and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.

(2) "The provision permits a group of producers and employees, according to their own views of expedience, to make rules as to hours and wages for the agreement. Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law which under the Fifth Amendment dominates the regulations which Congress may impose.

(3) The provision goes beyond any proper measure of protection of interstate commerce and attempts a broad regulation of industry within the State.

"We are not at liberty to deny to Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce."

Carter v. *Carter*, 298 U. S. 238, 319.

Repugnant to Article 13, Section 1.

These laws are repugnant to Article 13, Section 1 of amendments to the Constitution, because they virtually make a slave out of the farmer. It is required, under the act, to pay the penalty, or give the so-called "excess wheat" to a Secretary of Agriculture for nothing. *It takes labor to produce wheat. If, after it is produced, somebody else can take it, or exact forty-nine cents a bushel from you for raising it, it seems to us that constitutes involuntary servitude.* There is no need in enlarging upon that subject.

The amendment, besides abolishing slavery, "gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure."

> "United States *v.* Harris, 106 U. S. 629, 640 (1883), holding unconstitutional an act of Congress. (R. S. 5519) which provided a penalty in case 'two or more persons in any State * * * conspire * * * for the purpose of depriving * * * any person * * * of the equal protection of the laws or of equal privileges or immunities under the laws.' Such statute was broader than the amendment would justify."

Rule of Reason.

Appellants' Counsel believe in a liberal construction of the Constitution. In fact, they believe in the rule of reason. But that does not mean that either the Executive or Congress can annul the Constitution. It does not mean that the courts should sanction such Congressional nullification. If this law is constitutional, then, there is nothing that any person, be he member of Congress or member of any court, eats, drinks, wears or utilizes that Congress cannot regulate, annihilate or destroy under the Interstate Commerce Clause.

Then Congress can control the activities of the people

within the several states on the individual farm, in the individual factory and in the individual home of this nation. Then it can control all the energy, all the production and all the consumption within a state. Then the centralization of all power in the Federal Government at Washington will have been complete.

Stare Decisis.

No, the *Filburn* case and the *Beckman* case do not dispose of appellants' case. They are not decisive. The *Filburn* case was based upon estoppel. The *Beckman* case was not before this Court on its merits. However, if this Court disagrees with us, if it feels that it did dispose of the constitutional question, then, we feel that that decision is erroneous. It was based upon an erroneous stipulation of facts. And since it vitally affects our Government this Court should reconsider it. The doctrine of *stare decisis* does not apply to constitutional questions.

It has been said: "that the doctrine of *stare decisis* can never be properly applied to decisions upon constitutional questions. However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court." 2 Warren, The Supreme Court in United States History (1926) 748-9. The duty of the Court is to square a new statute with the Constitution itself. *United States* v. *Butler*, 297 U. S. 1.

In *Hertz* v. *Woodman*, 218 U. S. 205, 212, Mr. Justice Lurton said: "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether or not it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided."

Again, quoting 2 Warren, the Supreme Court in United States History, 748-9:

> " 'Any citizen whose liberty or property is at stake has an absolute constitutional right to appear before the Court and challenge its interpretation of the Con-

stitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions. * * * When the Bar of the country understand this, and respectfully but inexorably requires of the Supreme Court that it shall continually justify its decisions by the Constitution, and not by its own precedents, we shall gain a new conception of the power of our constitutional guaranties. * * * What we need is constant and unrelenting professional criticism of judicial opinions, and constant and unrelenting insistence that judicial errors of reasoning shall be judicially corrected.' Everett Abbott, Justice and the Modern Law (1913)."

Let Us Get the Correct Facts.

Legislative Findings?

Let us keep the record straight; designating legislative findings does not make those findings true. Most of the facts stated as facts in Section 331 of the Agricultural Adjustment Act, are not facts, they are incorrect statements and erroneous conclusions.

It is not true that wheat or flour flows almost entirely through instrumentalities of interstate and foreign commerce, from producers to consumers. The reverse is the truth—the bulk of it remains in intrastate commerce. *Thirty-two states, and the District of Columbia consume more wheat and flour than they produce. Only sixteen states produce more than they consume, and of those sixteen, only ten in quantity. Thirty-one per cent of all the wheat raised never leaves the farms on which it is produced.* It is used for seed and feed for livestock. An amount equal to sixty-eight per cent is consumed by and within the states. See tables 1, 2 and 3, and explanation in appendix hereto.

The reports and records of the Department of Agriculture, the Bureau of Census, and the Department of Commerce show that we have not had an abnormal supply of wheat since 1930, and prior thereto. Therefore, it could not

have been a burden upon interstate and foreign commerce. Again, common horse sense tells us, as well as the evidence, that an abundant crop stimulates interstate commerce. You cannot assist interstate commerce by curtailment of essential food products. Since there was no abnormal excess, the statements made in Section 331, that it overtaxed the facilities of interstate commerce and foreign transportation, are incorrect. See tables 1, 2 and 3 and explanation in appendix hereto.

Again, prices are depressed by price manipulation, and not by interstate commerce. The wheat trade has been well organized, and, as far as being orderly, it has been quite orderly—in fact, it has been a little too orderly and submissive to price manipulation. If there have been any abnormally deficient supplies, that has been due to the distressing shortsightedness of the Department of Agriculture, and not due to the farmer producing the food of a nation. Two erroneous statements never make a correct one.

In paragraph 3 of Section 331, a lot of high sounding phrases are used which mean really nothing. They are intended to becloud and muddle. They are intended to make the unthinking believe that the millennium is about to come. They are self-serving declarations. The truth is, that this part of the Agricultural Adjustment Act has performed no miracles. Of course, there has been an increase of prices since 1930 and 1932, but take ten years before 1932, and then ten years from 1932, and you will find that the income from agriculture was some ten billion dollars greater during ten years back from 1932, than it was from the ten years forward from 1932, in spite of all the camouflage and misrepresentation.

The last two paragraphs of section 331 remind us of boyhood orations in high school. They are just a jumble of words and erroneous conclusions, born of desire, rather than backed up with facts. *We submit it is not necessary to*

violate the Constitution in order to give agriculture its just dues. Legislative findings, when proven to be untrue by facts, cannot be made the basis of sustaining unconstitutional acts.

Conclusion.

We submit there has been a growing tendency to disregard the rights of states, and to centralize power in Washington. We deny, most emphatically, that this has been for the good of the nation. We submit that the struggle in the future will be to recover some of those rights, so readily surrendered by the people to the Federal government. Power always wants more power, and we are no exception to the rule, but let us come back to the Constitution.

> "The powers the people have given to the general government are named in the Constitution, and all not there named, either expressly or impliedly, are reserved to the people and can be exercised only by them or upon further grant from them." United States *v.* Williams, 194 U. S. 295.

We challenge the Secretary of Agriculture to point out to us under what provisions of the Constitution, Congress has the right to give to him the power to control and regulate the production of wheat. *No such power exists, therefore Congress cannot give it to him, or even delegate it to him.*

The states within their spheres are as independent of the general government, as the general government within its sphere is independent of the states. *Both must respect the Federal constitution. Buffington* v. *Day,* 11 Wall. 124.

If Congress can penalize a farmer 49 cents a bushel for raising wheat then it can penalize him $1 or $100 a bushel. Once grant the authority, then the sky is the limit.

The Constitution is not the Secretary of Agriculture nor is the Secretary the Constitution. It is the document of "we the people" and they alone can alter or amend it. Con-

gress cannot abrogate it. This is not permissible even in periods of great inertia. The inertia after all may be common horse sense.

We are 48 States but one Nation. Each state and each individual within a state has an equal right to compete with every other State and with every citizen of such states in the production of food and wealth. We have the constitutional right to eat the same or different food without interference by the Department of Agriculture.

In this country every man's home is still his castle. In the language of the English statesman, William Pitt (1708-1778), Earl of Chatham:

> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storms may enter, the rain may enter,—but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement."

And so under our Constitution: The poorest man may in his cottage bid defiance to all the forces of the Department of Agriculture. It may be frail; its roof may shake; the wind may blow through it; the storms may enter; the rain may enter,—but the Secretary of Agriculture cannot enter. All his pay rollers and penalty collectors dare not cross the threshold of the ruined tenement.

For the above reasons, it is respectfully submitted that the judgment of the court below should be reversed and the acts herein complained of held unconstitutional or in the alternate the case be remanded to the lower court with direction that it be tried on the merits.

Respectfully submitted,

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APPENDIX.

Table I—Wheat.

Official Returns of May 31, 1941, Wheat Referendum; Number of Wheat Farms; Number of Wheat Allotments; Number of Wheat Payees and Percentages, By States.

ANALYSIS

1. This table groups the 33 "deficit" states, including the District of Columbia, in one category and the 16 "surplus" states in the other.

2. The states are arranged in descending order as total consumption of wheat, by percentage, exceeds production.

3. The number of votes cast, wheat allotments and wheat payees are compared with and keyed to column 4—the number of wheat farms (on which any wheat was threshed) according to the United States Census 1940.

4. It is to be noted that there are 1,385,300 wheat farms—A total of 1,747,000 wheat allotments and 1,523,393 wheat payees in the United States and a total of 559,630 votes cast in the May 31, 1941 wheat referendum.

5. Therefore for each 100 wheat farms only 40.4 farmers voted in the May 31st Referendum while 56.3 farmers were disfranchised by Public Law 74—77th Congress and only 3.3 farmers who had a right to vote, did not vote.

6. On the other hand 47.4 per cent of all wheat farms are in the 33 "deficit" states and for each 100 wheat farms only 17.5 farmers voted in the May 31st Referendum—55.2 farmers were disfranchised and 27.3 farmers who had a right to vote, did not vote.

7. In the "surplus" states, 52.6 per cent of all wheat farms are located and for each 100 farms, 61 farmers voted in the May 31st Referendum and 57.3 farmers were dis-

franchised. This accounts for 118.3 farmers for each 100 wheat farms.

8. In the 33 "deficit" states there were 89.5 wheat allotments for each 100 wheat farms while in the 16 "surplus" states there were 159.1 wheat allotments for each 100 wheat farms—and for the United States 126.1.

9. The number of wheat payees in the "deficit" states equal 72.8 payees for each 100 wheat farms—143.5 in the "surplus" states and only 109.9 for the United States.

(Here follows 1 paster, Table I)

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TABLE I—WHEAT: OFFICIAL RETURNS OF MAY 31, 1941 WHEAT REFERENDUM

Number of Farms Threshing Wheat; Number of Wheat Allotments; Number of Wheat Payees and Percentages, by States

STATES	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
	NUMBER OF VOTES CAST May 31st, 1941.			Number Wheat Farms 1940 Census	NUMBER WHEAT ALLOTMENTS		Number of Payees "WHEAT"	Votes cast as percentage of Wheat Farms	Payees as percentage of Wheat Farms	Total Wheat Allotments as percentage of Wheat Farms	Wheat Allotments under 15 acres as percentage of Wheat Farms
	Yes	No	Total		Total	Under 15 Acres					
1 Vermont	0	0	0	57	0	0	0	0.	0.	0	
2 Alabama	9	1	10	967	0	0	48	0.1	4.9	0	
3 Maine	0	0	0	509	0	0	0	0.	0.	0	
4 Arkansas	119	11	130	3,204	9,000	9,000	6,351	0.4	198.2	280.8	280.2
5 New Jersey	107	211	318	4,141	1,000	1,000	881	7.6	21.2	24.1	24.1
6 Georgia	163	89	252	29,911	3,000	3,000	551	0.8	1.8	10.0	10.0
7 New York	1,087	909	1,996	26,825	19,000	14,000	6,901	7.4	25.7	70.8	52.1
8 Wisconsin	167	6	173	18,856	21,000	21,000	16,865	0.9	89.4	111.3	111.3
9 South Carolina	273	44	317	41,111	3,000	3,000	235	0.7	0.5	72.9	72.9
10 West Virginia	289	161	450	16,223	1,000	1,000	1,430	2.7	8.8	6.1	6.1
11 North Carolina	1,919	371	2,290	57,695	4,000	3,000	5,370	3.9	9.3	6.9	5.1
12 Tennessee	934	463	1,397	35,305	11,000	3,000	10,840	3.9	29.6	31.1	8.4
13 Kentucky	4,081	692	4,773	30,197	14,000	5,000	12,980	15.8	42.9	46.3	16.5
14 Pennsylvania	2,648	3,703	6,351	81,325	55,000	37,000	33,261	7.8	40.8	67.6	45.4
15 Iowa	3,783	636	4,419	21,601	31,000	23,000	33,935	20.4	157.0	143.5	106.4
16 California	1,986	1,020	3,006	5,011	9,000	1,000	6,286	59.9	125.4	179.6	19.9
17 Arizona	111	3	114	1,380	1,000	0	814	0.8	58.9	72.4	0.
18 Nevada	94	61	155	831	1,000	1,000	912	18.6	109.7	120.3	120.3
19 Virginia	2,218	976	3,194	52,640	12,000	12,000	11,280	9.7	21.4	22.7	22.7
20 Michigan	5,270	1,643	6,913	69,197	95,000	84,000	59,483	9.9	85.9	145.7	121.3
21 Maryland	2,992	886	3,878	17,140	16,000	7,000	14,150	22.6	82.5	93.3	40.0
22 Missouri	18,472	4,698	23,170	70,958	116,000	73,000	96,011	32.5	135.3	163.4	102.8
23 Texas	15,069	1,001	16,070	26,387	59,000	3,000	70,272	60.9	266.3	223.5	11.3
24 Illinois	25,502	9,720	35,222	63,363	105,000	58,000	86,601	55.5	136.6	165.7	91.5
25 Delaware	805	76	881	2,829	3,000	1,000	3,740	31.1	132.2	106.0	35.3
26 Massachusetts	0	0	0	38	0	0	0	0.	0.	0.	0.
27 Connecticut	0	0	0	43	0	0	0	0.	0.	0.	0.
28 Rhode Island	0	0	0	7	0	0	0	0.	0.	0.	0.
29 New Hampshire	0	0	0	11	0	0	0	0.	0.	0.	0.
30 District of Columbia	0	0	0	0	0	0	0	0.	0.	0.	0.
31 Mississippi	0	0	0	79	0	0	0	0.	0.	0.	0.
32 Louisiana	1	12	13	8	0	0	0	162.5	0.	0.	0.
33 Florida	0	0	0	0	0	0	0	0.	0.	0.	0.
TOTALS DEFICIT STATES	88,099	27,393	115,492	657,876	589,000	363,000	479,197	17.5	72.8	89.5	55.1
1 Ohio	15,940	17,896	33,836	120,882	168,000	129,000	97,285	28.0	80.4	138.9	106.7
2 Colorado	7,866	1,144	9,010	15,906	26,000	3,000	29,441	56.6	185.0	163.4	18.8
3 Minnesota	20,614	3,282	23,896	81,167	111,000	76,000	96,092	29.4	118.3	136.7	93.6
4 Wyoming	1,731	136	1,867	4,369	7,000	1,000	6,076	42.7	139.0	160.2	22.8
5 Utah	6,560	368	6,928	12,310	17,000	12,000	12,247	56.3	99.5	138.2	97.5
6 Indiana	20,340	10,839	31,179	75,411	122,000	89,000	87,866	41.3	116.5	161.7	118.0
7 New Mexico	1,434	81	1,515	6,211	4,000	0	4,158	24.3	66.9	64.4	0.
8 South Dakota	28,424	2,056	30,480	40,337	85,000	23,000	115,577	75.5	286.5	210.7	57.0
9 Oklahoma	31,562	7,712	39,274	51,250	97,000	18,000	88,246	76.6	172.1	189.2	35.1
10 Oregon	5,555	260	5,815	14,734	16,000	2,000	15,996	39.4	108.5	108.5	13.5
11 Nebraska	33,206	7,224	40,430	58,212	94,000	23,000	115,815	69.4	198.9	161.4	39.5
12 Idaho	12,081	764	12,845	22,795	31,000	10,000	25,672	56.3	112.6	135.9	43.8
13 North Dakota	66,253	3,708	69,961	65,815	129,000	7,000	138,783	106.2	210.8	196.0	10.6
14 Washington	14,394	990	15,384	12,668	16,000	12,000	11,369	121.4	89.7	126.3	94.7
15 Kansas	81,398	20,568	101,966	100,240	186,000	9,000	157,831	101.7	157.4	185.5	8.9
16 Montana	18,112	1,640	19,752	25,192	49,000	3,000	41,742	78.4	165.6	194.5	11.9
TOTALS, SURPLUS STATES	365,470	78,668	444,138	727,463	1,158,000	417,000	1,044,196	61.0	143.5	159.1	57.3
TOTALS, UNITED STATES	453,569	106,061	559,630	1,385,300	1,747,000	780,000	1,523,393	40.4	109.9	126.1	56.3

References:

(1)-(2)-(3) Release entitled "Announce Official Returns of May 31 Wheat Referendum, July 14, 1941, U.S.D. of A.
(4) U. S. Department of Commerce, Bureau of the Census, Agriculture, U. S. Summary, First Series PP. 46, 47, 48, 49, 50, 51.
(5)-(6) Wheat Allotments, 1941, Division of Special Programs, A.A.A. Jan. 30, 1942.
(7) Statistical Summary—1940 Parity Payment Program—Table No. 10—Nov. 1941. U.S.D. of A., A.A.A.
(8) Votes cast as percentage of farms on which wheat was threshed.
(9) Payees as Percentage of Col. 4.
(10) Column 5 as percentage of Column 4.
(11) Column 6 as percentage of Column 4.

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Table II—Wheat.

Production and Disappearance by Uses, by States—Five year averages for Period 1931-'32 to 1935-'36; Mill grindings by States and uses as Percentage of Production.

Analysis.

1. This Table groups the 33 "deficit" states, including the District of Columbia, in one category and the 16 "surplus" states in the other.

2. The states are arranged in descending order as total consumption of wheat, by percentage, exceeds production.

3. In this 5 year period, domestic consumption of wheat exceeded production by 1,397,000 bushels a year.

4. In the 33 "deficit" states a total consumption of wh[illegible] exceeded production by 261,957,000 bushels a year.

5. In the 16 "surplus" states, production of wheat exceeded consumption by 260,560,000 bushels a year.

6. The 260,560,000 bushels of surplus from the 16 "surplus" states is shipped into the 33 "deficit" states, therefore about 260,560,000 bushels out of a total of 680,603,000 bushels or only about 38.2 per cent of our total production of wheat flows in the channels of Interstate Commerce.

7. This would indicate that about 61.8 per cent of our wheat production is consumed in the states where produced, or Intrastate Commerce.

8. We know that 37.3 per cent of all wheat produced in the 33 "deficit" states is used for feed and seed and therefore for all practical purposes, does not leave the farm on which it is produced.

9. In the 16 "surplus" states, 28.5 per cent of the wheat produced is used for feed and seed and for the United States 30.8 per cent.

10. Mill grindings in the 16 "surplus" states exceeds consumption, as food, by about 150,925,000 bushels of wheat.

11. Mill grindings in the 33 "deficit" states is about 164,719,000 bushels of wheat less than consumption as food.

12. This would indicate that about 109,635,000 bushels of wheat—as wheat—and about 150,925,000 bushels of wheat—as flour—is shipped annually from the "surplus" states to the "deficit" states, totalling 260,560,000 bushels or 38.2 per cent of our total production.

13. Consumption as food about equals the difference between total consumption and feed and seed used on the farm.

(Here follows 1 paster, Table II)

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TABLE II—WHEAT: Production and Disappearance, by uses, by States: Five Year average for Period 1931-'32 to 1935-'36; Mill Grindings, by States and Uses as Percentage of Production.

STATES	(1) Total Production	(2) Total Consumption	(3) Consumption as Percentage of Production	(4) Consumption in excess of Production	(5) Mill Grindings	(6) Number of Mills 1940	(7) Seed	(8) Feed	(9) Feed and Seed	(10) Feed and Seed as Percentage of Production	(11) Consumption as Food	(12) Food Consumption as % of Production
	1,000 Bushels	1,000 Bushels		1,000 Bushels	1,000 Bushels		1,000 Bushels	1,000 Bushels	1,000 Bushels		1,000 Bushels	
1 Vermont	4	1,435	35,875.0	1,431		0	0	69	69	1,725.0	1,366	34,150.0
2 Alabama	60	11,632	19,386.7	11,572	401	0	8	91	99	165.0	11,533	19,221.6
3 Maine	124	3,113	2,510.5	2,989	47	0	14	104	118	95.1	2,995	2,415.3
4 Arkansas	552	9,144	1,656.7	8,592	762	1	103	751	854	154.7	8,290	1,501.8
5 New Jersey	1,176	15,851	1,347.9	14,675	334	3	113	780	893	75.9	14,958	1,271.9
6 Georgia	1,188	12,776	1,075.4	11,588	760	6	226	201	427	35.9	12,349	1,039.4
7 New York	5,020	48,362	963.4	43,342	57,350	33	527	2,238	2,765	55.0	45,597	908.3
8 Wisconsin	1,797	12,394	689.7	10,597	3,076	8	213	1,451	1,664	92.5	10,730	597.1
9 South Carolina	1,238	8,066	651.5	6,828	300	6	205	283	488	39.4	7,578	612.1
10 West Virginia	2,006	8,276	412.7	6,270	1,515	9	248	804	1,052	52.4	7,244	361.1
11 North Carolina	4,731	15,445	326.5	10,714	4,462	36	593	946	1,539	32.5	13,906	293.9
12 Tennessee	4,113	12,932	314.4	8,819	7,334	49	510	1,111	1,621	39.4	11,311	275.0
13 Kentucky	4,671	13,052	279.4	8,381	6,203	56	589	1,044	1,633	34.9	11,419	244.4
14 Pennsylvania	17,551	43,738	249.2	26,187	6,309	90	1,987	6,310	8,297	47.2	35,441	201.9
15 Iowa	5,185	12,276	236.8	7,091	8,842	14	600	2,267	2,867	55.2	9,409	181.4
16 California	11,192	22,930	204.9	11,738	8,702	12	1,303	1,079	2,382	21.2	20,548	183.5
17 Arizona	877	1,762	200.9	885	250	4	62	216	278	31.6	1,484	169.2
18 Nevada	352	596	169.3	244	103	0	22	226	248	70.4	348	98.8
19 Virginia	8,695	13,343	153.5	4,648	4,738	68	804	1,987	2,851	32.7	10,492	120.6
20 Michigan	16,442	24,995	152.0	8,553	7,765	38	1,627	6,315	7,942	48.3	17,053	103.7
21 Maryland	7,586	8,412	110.9	826	2,339	22	774	1,308	2,082	27.4	6,330	83.4
22 Missouri	23,100	25,038	108.4	1,938	37,839	61	2,449	8,436	10,885	47.1	14,153	61.2
23 Texas	30,105	32,480	107.9	2,375	27,906	42	3,556	4,916	8,472	28.1	24,208	80.4
24 Illinois	34,451	35,900	104.2	1,449	23,689	42	2,985	4,971	7,956	23.0	27,944	81.1
25 Delaware	1,432	1,487	103.8	55	315	7	146	363	509	35.5	978	68.2
26 Massachusetts	0	14,452	0	14,452	25	0	0	109	109	0	15,343	0
27 Connecticut	0	6,075	0	6,075	10	0	0	100	100	0	5,975	0
28 Rhode Island	0	2,501	0	2,501	0	0	0	81	81	0	2,420	0
29 New Hampshire	0	1,796	0	1,796	124	0	0	44	44	0	1,752	0
30 District of Columbia	0	1,974	0	1,974	99	1	0	0	0	0	1,974	0
31 Mississippi	0	8,694	0	8,694	0	0	0	97	97	0	8,597	0
32 Louisiana	0	8,605	0	8,605	0	0	0	53	53	0	8,552	0
33 Florida	0	6,073	0	6,073	0	0	0	23	23	0	6,050	0
TOTAL DEFICIT STATES	183,648	445,605	242.6	261,957	213,608	608	19,724	48,774	68,498	37.3	378,327	206.0
1 Ohio	41,936	39,372	93.9	(a) 2,564	16,122	80	3,951	11,323	15,274	36.4	24,098	57.4
2 Colorado	8,712	8,147	93.8	(a) 565	4,823	21	1,809	2,465	4,274	49.0	3,873	44.4
3 Minnesota	17,871	16,629	93.1	(a) 1,242	62,217	51	2,827	4,101	6,928	38.7	9,701	54.2
4 Wyoming	2,127	1,918	90.2	(a) 209	418	4	335	736	1,071	50.3	847	39.8
5 Utah	4,556	3,845	84.4	(a) 711	5,240	21	384	1,595	1,979	43.4	1,866	40.9
6 Indiana	30,820	21,830	70.8	(a) 8,990	12,646	51	3,023	6,470	9,493	30.8	12,337	40.0
7 New Mexico	3,025	2,143	70.8	(a) 882	278	2	280	299	579	19.1	1,564	51.7
8 South Dakota	20,113	11,326	56.3	(a) 8,787	719	6	4,598	4,085	8,683	43.1	2,643	13.1
9 Oklahoma	44,868	21,782	48.5	(a) 23,086	18,744	30	4,088	7,673	11,761	26.2	10,021	22.3
10 Oregon	16,689	7,924	47.5	(a) 8,765	12,847	19	1,763	2,621	4,384	26.2	3,540	21.2
11 Nebraska	34,065	14,165	41.6	(a) 19,900	12,899	39	3,893	5,146	9,039	26.5	5,126	15.0
12 Idaho	20,771	8,505	40.9	(a) 12,266	2,243	17	1,631	5,113	6,744	32.4	1,761	8.4
13 North Dakota	59,675	21,665	36.3	(a) 38,010	4,951	12	13,374	5,636	19,010	31.8	2,655	4.4
14 Washington	42,083	13,105	31.1	(a) 28,978	19,607	23	3,169	4,218	7,387	17.5	5,718	13.5
15 Kansas	117,474	34,667	29.5	(a) 82,807	65,422	80	13,323	14,375	27,698	23.5	6,969	5.9
16 Montana	32,170	9,372	29.1	(a) 22,798	6,442	17	4,335	3,063	7,598	23.0	1,974	6.1
TOTALS SURPLUS STATES	496,955	236,395	47.5	(a)260,560	245,618	473	62,783	78,919	141,702	28.5	94,693	19.0
TOTALS U.S.A.	680,603	682,000	100.2	1,397	459,226	1,081	82,448	127,693	210,141	30.8	473,020	69.5

References:
(a) Production in excess of consumption.
(1) The Wheat Situation U. S. Department of Agriculture. August 1941.
(2) The Wheat Situation U. S. Department of Agriculture. August 1941.
(3) Consumption as percentage of Production.
(4) Consumption in excess of Production 33 Deficit States and Production excess of Consumption 16 Surplus States.
(5) Mill Grindings Department of Commerce, Bureau of the Census.
(6) Number of Mills 1940 only. Department of Commerce, Bureau of the Census.
(7) The Wheat Situation U. S. Department of Agriculture, August 1941.
(8) Fred for Livestock, The Wheat Situation, U. S. Department of Agriculture, August 1941.
(9) Total of Columns 7 and 8.
(10) Column 9 as percentage of column 1.
(11) U. S. Department of Agriculture, Statistical and Historical Research.
(12) Column 11 as percentage of Column 1.

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Table III—Wheat.

Supply and Distribution in Continental United States: Crop Years 1933 to 1940 inclusive, showing cumulative Consumption and Exports; New crop; Deficit; Supply and Net Reserves, including Imports.

Analysis.

1. This Table presents the combined totals of supply and distribution of wheat for the crop year, beginning July 1, 1933 and ending June 30, 1941.

2. 11.6 per cent of wheat produced was used for seed for new crop.

3. 13.3 per cent of wheat produced was fed on the farms of growers. 24.9 per cent of production does not leave the farm.

4. 69.8 per cent of wheat produced was used for commercial foods and feeds. All domestic disappearance 94.7 per cent of production.

5. 6.3 per cent of wheat production was exported and shipped.

6. Therefore 101.0 per cent of our wheat production was consumed, exported and shipped.

7. This proves that at the end of the 8th crop year we are in a deficit position from new crop production by 56,400,000 bushels.

8. Column 9 shows the cumulative deficit of production thru the years July 1, 1933 to June 30, 1941.

9. Taking into account all known sources of wheat supply, carry-over, production and imports of wheat—feed wheat and flour, during the first seven of the eight years, our net reserve was less than the 377,900,000 bushel carry-over at the beginning of the period, July 1, 1933.

10. It has taken eight years of production and imports to replace our reserve carry-over of 377,900,000 bushel which we had on July 1, 1933 and "up" it by 33,200,000 bushels.

Note.

The increase in production of wheat from the 1900-'4 period to 1935-'39 period is 16.6% while the increase in population for the same period is 62.9%. On the basis of an average per capita consumption rate or food of 3.7 bushels it requires 208,100,000 bushels more wheat to feed our nation in 1940 than it required in 1900.

(Here follows 1 paster, Table III)

TABLE III—WHEAT: Supply and Distribution in Continental United States; Crop Years, 1933 to 1940 inclusive, showing Cumulative Consumption and Exports; New Crop; Deficit; Supply and Net Reserves, including Imports.

Crop Year beginning July 1	(1) Seed, New Crop	(2) Feed (on Farms of Growers)	(3) Foods and Commercial Feeds	(4) Exports and Shipments	(5) Total Consumption and Exports	(6) New Crop	(7) Cumulative Consumption and Exports	(8) Cumulative New Crop	(9) Cumulative Deficit of Production	(10) Imports Milling, Feed-Wheat	(11) Cumulative Supply Production Imports & Carry-Over	(12) Cumulative Consumption and Exports	(13) Cumulative net Reserve, All Sources
	Million Bu.	Million Bu.	Million Bu.	Million Bu.	Million Bu.	Million Bu.	Million Bu.	Million Bu.	Million Bu.	Thousand Bu.	Million Bu.	Million Bu.	Million Bu.
1933	77.8	72.9	476.9	28.3	655.2	551.6	655.2	551.6	- 103.6	153.0	(14) 929.7	655.2	274.5
1934	82.5	83.7	489.1	13.3	668.6	526.3	1,323.8	1,077.9	- 245.9	15,569.0	1,471.6	1,323.8	147.8
1935	87.5	83.1	488.6	7.1	666.3	626.3	1,990.1	1,704.2	- 285.9	34,617.0	2,132.5	1,990.1	142.4
1936	96.5	88.2	503.2	12.2	700.1	626.7	2,690.2	2,330.9	- 359.3	34,455.0	2,793.7	2,690.2	103.5
1937	94.1	112.8	495.8	103.3	806.0	875.6	3,496.2	3,206.5	- 289.7	634.0	3,669.9	3,496.2	173.7
1938	75.8	125.5	498.8	109.5	809.6	931.7	4,305.8	4,138.2	- 167.6	271.0	4,601.9	4,305.8	296.1
1939	72.8	91.4	537.3	48.3	749.8	751.4	5,056.6	4,889.6	- 167.0	(15) 263.0	5,353.6	5,055.6	298.0
1940	74.7	100.4	494.7	37.2	707.0	816.6	5,762.6	5,706.2	- 56.4	3,523.0	6,173.7	5,762.6	411.1
TOTALS (as of June 30th 1941)	661.7	757.3	3,984.4	359.2	5,762.6	5,706.2	5,762.6	5,706.2	- 56.4	89,485.0	6,173.7	5,762.6	411.1

References: (1) Seed for New Crop—The Wheat Situation, No. WS-58, issued August 1941, P. 2.
(2) Fed on farms of wheat growers—The Wheat Situation (SUPRA).
(3) Foods and Commercial feeds—The Wheat Situation (SUPRA).
(4) Exports include only flour made of domestic wheat and wheat. Imports for milling in bond excluded. The Wheat Situation (SUPRA).
(5) Total of columns 1-2-3-4.
(6) New crop—The Wheat Situation (SUPRA).
(7) Cumulative total domestic disappearance and exports 8 years.
(8) Cumulative total new crop—8 years, excluding carry-over as of July 1, 1933.
(9) Cumulative excess of domestic disappearance and exports over domestic production—excluding carry-over July 1, 1933.
(10) Imports, also "full duty" (42c) and 10 and 5 per cent ad valorem duty—The Wheat Situation (SUPRA).
(11) Cumulative total new crop including carry-over of 377.9 million bushels as of July 1, 1933, plus imports (See Column 10).
(12) Cumulative total domestic disappearance and export.
(13) Cumulative supply of wheat including carry-over of 377.9 million bushels on July 1, 1933.
(14) Carry-over of 377.9 million bushels added to new crop of 1933.
(15) Effective Jan. 1, 1939, new trade agreement with Canada reduced ad valorem duty on "feed wheat" from 10% to 5%—The Wheat Situation, p. 23, (SUPRA).

Compiled by: EDWARD E. KENNEDY,
Kankakee, Illinois

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 15347.

KENNETH BENDER, Farmer, Canton, Ohio; H. H. BECKMAN, Farmer, Clay Center, Kan.; CLYDE F. SNODGRASS, Farmer, Muddy Creek Forks, Pa.; and ALFRED LINDAUER, Farmer, Chelsea, Mich., *Plaintiffs*,

vs.

CLAUDE R. WICKARD, Individually and as Secretary of Agriculture of the United States of America, Department of Agriculture Building, the Mall Between 12th Street and 14th Street, S. W., Washington, D. C., *Defendant*.

OFFER OF PROOF.

Come now the plaintiffs in the above entitled cause and show the Court that if they were allowed to testify they would testify as follows:

That the plaintiff Kenneth W. Bender would testify that he was a farmer residing at Canton, Ohio, that his occupation has been that of a farmer for over fifty years. That he owns and farms 138 acres of land. That this farm is his and his family's home. That this farm is used for the production of grain, livestock, poultry, fruit, and dairy products. That during the cropping season of 1940 and 1941 he planted, harvested, and threshed nineteen acres of winter wheat for feed, family consumption, seed, and as a nurse crop for legumes.

That plaintiff did not sell or market any of said wheat. That for many years he has planted a small acreage of winter wheat as a rotation crop and has always used the wheat for seed, family consumption or feed. That in his farming operations he never sells his wheat but uses that part which he does not need for seed, for family consumption, and feed for livestock.

That this plaintiff would testify that he never accepted any money from the AAA or its program nor did he ever

comply with its program nor has he any intention of doing so. That to do so it would mean a financial loss to him every year. That he never received or accepted any subsidies from the AAA or any other agency of the government through the provisions of the Agricultural Adjustment Act of 1938, as amended.

That this plaintiff would testify that his allotment for the year 1941 by the AAA under the provisions of the Agricultural Adjustment Act of 1938, as amended, was between fourteen and fifteen acres. That notwithstanding that he had planted only nineteen acres in wheat the defendant penalized him 49¢ per bushel on 242.8 bushels or $1,196.97. Although the defendant now admits that he was grossly in error yet his agents who are attempting to collect this penalty have never notified the plaintiff to that effect.

That as one of the six million farm families of the Nation he has sustained a general financial loss as a farmer because he has been compelled to pay taxes for the loss the government sustained because of the waste and extravagance of the AAA program under the provisions of the Agricultural Adjustment Act of 1938, as amended.

This plaintiff would testify that wheat unthreshed is of little or no value for feed nor for any other purpose except possibly for chicken feed and for that purpose at least one third would be wasted. That wheat generally has little or no value unless it is threshed. That if this plaintiff is compelled to pay this 49¢ penalty tax on the so called excess wheat under the AAA program then it would mean the confiscation of his property. That the government now asks this plaintiff and other farmers to produce more beef, more pork, more poultry, more eggs, and more butter and at the same time attempts to restrict the production of those crops that are best suited and would enable plaintiff to comply with the government's request.

That this plaintiff denies that the AAA program of the Agricultural Adjustment Act of 1938, as amended, has increased the price of wheat or any other farm commodity. That in fact it has placed a ceiling and not a floor on the prices paid for agricultural products. That in truth the government keeps the price of wheat down by using the

wheat it has received under its loan policy and selling it in competition with the farmer's wheat whenever the price goes above the ceiling it has fixed. This plaintiff if allowed to testify would testify that he knows from his experiences as a farmer of fifty years that he never received any benefit directly or indirectly from any provision of the Agricultural Adjustment Act of 1938, as amended, but that on the other hand he has sustained a loss even outside of the attempted collection of the so called 49¢ penalty tax.

This plaintiff would deny as untrue the claim that the farmer received $1.16 on an average for his wheat for 1941 because of said program or that the world price was only 40¢ a bushel. That these claims are based upon fake statistics and are wholly untrue. The plaintiff would testify that farmers who did not cooperate with the AAA received on an average 85¢ to 90¢ a bushel and that those who cooperated with the AAA received on an average 98¢ a bushel as a loan out of which there were many deductions for inspections, insurance and storage, which he had to provide, and further that the world market was around 80¢ a bushel and not 40¢ during 1941.

That the plaintiff H. H. Beckman would testify that he was a farmer residing at Clay Center, Kansas. That his occupation has been that of a farmer for over forty years. That he has been president of the local Farmers Union and a member of other farm organizations. That he has made a study of agriculture and the marketing of farm products.

That he owns and personally operates a 232 acre farm and owns and leases another farm of 210 acres to a tenant. That this farm is his and his family's home. That during the cropping season of 1940 and 1941 he planted, harvested, and threshed 150 acres of winter wheat. That under the Agricultural Adjustment Act of 1938, as amended, he was allotted between 68 and 70 acres of wheat for 1941. That he was penalized $557.13 for so called excess wheat for the year 1941. That he feeds a large part of his wheat to cows, livestock, and poultry.

That this plaintiff would testify that he never accepted any money from the AAA or its program nor did he ever comply with its program nor has he any intention of doing

so. That to do so it would mean a financial loss to him every year. That he never received or accepted any subsidies from the AAA or any other agency of the government through the provisions of the Agricultural Adjustment Act of 1938, as amended.

That as one of the six million farm families of the Nation he has sustained a general financial loss as a farmer because he has been compelled to pay taxes for the loss the government sustained because of the waste and extravagance of the AAA program under the provisions of the Agricultural Adjustment Act of 1938, as amended.

This plaintiff would testify that wheat unthreshed is of little or no value for feed nor for any other purpose except possibly for chicken feed and for that purpose at least one third would be wasted. That wheat generally has little or no value unless it is threshed. That the wheat raised and best suited in the plaintiff's locality is bearded wheat. And because of the beards livestock will not eat it and if they do it would be dangerous to their health and may kill some. That if this plaintiff is compelled to pay this 49¢ penalty tax on the so called excess wheat under the AAA program then it would mean the confiscation of his property. That the government now asked this plaintiff and other farmers to produce more beef, more pork, more poultry, more eggs, and more butter and at the same time attempts to restrict the production of those crops that are best suited and would enable plaintiff to comply with the government's request.

That this plaintiff denies that the AAA program of the Agricultural Adjustment Act of 1938, as amended, has increased the price of wheat or any other farm commodity. That in fact it has placed a ceiling and not a floor on the prices paid for agricultural products. That in truth the government keeps the price of wheat down by using the wheat it has received under its loan policy and selling it in competition with the farmer's wheat whenever the price goes above the ceiling it has fixed. This plaintiff if allowed to testify would testify that he knows from his experiences as a farmer of forty years that he never received any benefit directly or indirectly from any provision of the Agricultural Adjustment Act of 1938, as amended, but that on the

other hand he has sustained a loss even outside of the attempted collection of the so called 49¢ penalty tax.

That this plaintiff would testify that his farm is equipped for small grain farming only. That his farm is not economically profitable for the production of corn or cultivated crops. These crops are damaged by hot winds in July, August and September, while winter wheat matures before the hot winds arrive. That if he is compelled to comply with the Agricultural Adjustment Act of 1938 as amended he will sustain a loss because all the farm equipment he has will not be necessary; in fact he will have an excess of farm machinery of one third which will amount to a loss of at least $2,000.

This plaintiff would also testify that he made more money on an average before the AAA program or the enactment of the Agricultural Adjustment Act of 1938, as amended, than he has made since. He would deny that there was a shortage of storage capacity because of a surplus of wheat, but as a fact the shortage of storage capacity was caused by the AAA program. That he could have stored 3000 bushels more of wheat had he not been compelled to use his storage capacity for substitutes such as oats, barley, and rye. And that he knows the same is true of neighboring farmers. He knows of his own knowledge that mills in his State did not lack storage capacity; as a matter of fact they did not have grain enough to grind. He knows that the government in order to keep the price down shipped wheat to some mills and elevators in Kansas and sold it at 82¢ a bushel as feed or about 30¢ below the ceiling price under the loan rate.

This plaintiff would deny as untrue the claim that the farmer received $1.16 on an average for his wheat for 1941 because of said program or that the world price was only 40¢ a bushel. That these claims are based upon fake statistics and are wholly untrue. The plaintiff would testify that farmers who did not cooperate with the AAA received on an average 85¢ to 90¢ a bushel and that those who cooperated with the AAA received on an average 98¢ a bushel as a loan out of which there were many deductions for inspections, insurance and storage, which he had to provide, and further that the world market was around 80¢ a bushel

and not 40¢ during 1941. That unless restrained the defendant will enforce the 49¢ penalty and collect it by taking the plaintiff's wheat or other property without just compensation or without any compensation whatsoever directly or indirectly.

The witness Edward E. Kennedy if he had been permitted to testify would have testified that he was born and raised on a farm in Iowa. That he operated a farm in Minnesota and Iowa for sixteen years.

That since 1920 he has made an extensive and comprehensive study of farm commodity prices. That for a number of years he was Secretary of the National Farmers Union, later Vice-President of the Farmers Guild. That since 1936 he has been Legislative Representative in Washington, D. C., for various farm organizations and individual farmers.

That in 1928 he prepared and made a comprehensive report on cost of production of various agricultural products including wheat. That this report has been used and studied by members of the Senate and House Agricultural Committees. That he has made other reports and has testified before numerous Federal and State Agricultural Committees.

That he has made extensive studies of the domestic market and the world market prices not only of wheat but of all leading agricultural products. That he knows the world market as well as the domestic market prices during 1940 and 1941 as well as previous and subsequent years not only of wheat but all other agricultural products. That he knows the operation of the AAA program under the Agricultural Adjustment Act of 1938, as amended. That he knows the effect this Act has had upon prices and upon agriculture as well as upon the individual farmer. That basing his knowledge gained by these studies he would testify if permitted as follows:

That the reason our annual export of wheat and flour diminished between the period of 1920 from 25% of total production to less than 10% in 1940 was due largely because we had no wheat to sell—not to over production. That during that period there was a general decline per capita of wheat available for world consumption. That

during the eight-year period from 1933 to 1940, inclusive, there was an accumulated deficit each year. That during these eight years we consumed more wheat than we produced. We imported more wheat and wheat substitutes than we exported.

This witness would testify that the claim made by the defendant that the cooperator as a result of the AAA program received on an average $1.16 a bushel for his wheat as compared with the world market price of 40¢ a bushel is not true and is wrong at both ends. That the farmer who cooperated during the time here in question (that is from October 1940 when the plaintiffs' wheat was planted and August 1941 when it was threshed) did not receive $1.16 per bushel but in place could make a loan of 98¢ a bushel. But in order to get the 98¢ loan he had to furnish storage capacity, pay insurance, inspection, and other expenses. That during that period the non-cooperator received on an average 85¢ to 90¢ a bushel and that was the domestic market, not $1.16.

That the claim made by defendant that during this period the world price was 40¢ a bushel is equally untrue and cannot be sustained by any facts. During this period the prices paid at Winnipeg, Canada, for similar wheat and similar grades was on an average between 64¢ and 72¢ per bushel and the Liverpool market, which might be considered the world market, during this same period was between 84¢ and 92¢ a bushel. That prior to the World War Germany, Italy, and other countries were subsidizing and paying $2 a bushel for wheat. This was due not to world surplus but to world scarcity of wheat.

That in this connection this witness would testify that the Agricultural Department has completely ignored the fact that while the increase in production of wheat from the 1900-'4 period to 1935-'39 period is 16.6% while the increase in population for the same period is 62.9%. On the basis of an average per capita consumption rate of food of 3.7 bushels it requires 208,100,000 bushels more wheat to feed our nation in 1940 than it required in 1900. The same is true in connection with the world increase in wheat and in population. It would seem that the Department of Agriculture is about thirty-five or forty years be-

hind the times in its computation of consumption and production of wheat. It assumes that the population has remained constant since 1900.

That the defendant erroneously assumes that Soil Conservation and Parity Payments are part of the price paid for wheat. The truth is that the cooperator with the AAA program pays dearly in toil and in expenses for the Parity and Soil Conservation check. That there is no connection between these payments and the price paid for wheat. That in order to receive a Soil Conservation Payment the cooperator has to comply with the ideas and rules and regulations of some sidewalk farmer in the Department of Agriculture. He has to plow, disk, and cultivate according to a Washington idea. In order to get Parity Payments he has to reduce his acreage and usually sustains a loss. This is not a subsidy it is a payment made under an agreement for services rendered or to be rendered.

This witness would testify further from his studies that the Agricultural Adjustment Program has not increased the price of wheat but that in fact it has been used to keep the price of wheat down by government manipulation. That it deliberately kept the price of wheat down by using some of the wheat that it receives under its loan policy and sells in competition with the farmer's wheat far below the market price. It provides a ceiling and not a floor; but for this wheat would be selling around $2 a bushel and more.

This witness would testify that the claim of the defendant, that the farmer as a result of the wheat program is able to market his wheat at a price "far above any world price based on the natural reaction of supply and demand," is incorrect, and not supported by any facts. The theory that supply and demand governs prices has been exploded. The truth is that the world production per capita of wheat has decreased since 1915 from 2.22 bushels to 1.86 bushels by 1936. In other words, the population increased faster than the world production of wheat.

This witness would further testify that unthreshed wheat has very little value. It is not economical to feed unthreshed wheat to hogs or chickens because most of it will

be wasted and hogs generally will not eat it in that form. He would testify that the plowing and the preparing of the soil and the furnishing of seed and planting and harvesting are done before threshing starts. In fact the crop is completed and all the expenses have been incurred except some 8¢ a bushel for threshing. That the claim that the farmer could avoid the 49¢ penalty by not threshing is absurd.

He would further testify that no farmer whether a co-operator or non-cooperator, unless he is one of 156,000 on the Department of Agriculture payroll, has on the whole received any benefits directly or indirectly because of the Agricultural Adjustment Act of 1938, as amended. That in his opinion the prices of agricultural products on the average would be virtually the same as they are and in many cases much higher if the Act had never been passed.

This witness would testify that from his studies the six million farm families of this Nation sustained a financial loss because of the expenses of administering and carrying out the provisions of this Act. That the farmer who is a non-cooperator sustained a financial loss because of the Act, first, by having to support it by paying his share of the national tax burden and, secondly, because of the confiscatory penalty and restriction of production. And that the Nation's food supply has been hampered and endangered because of the AAA program.

He would further testify that wheat acreage allotment quotas were not uniformly distributed pro rata to counties within the State and to farmers within the counties. As a result the plaintiffs in this action have been unfairly and arbitrarily discriminated against. And this is true of hundreds and thousands of farmers. That from his studies he knows that the great majority of wheat farmers are non-cooperators because to cooperate under the AAA program means a financial loss.

That this witness compiled exhibit one hereto attached and made part hereof entitled, "Wheat, Supply and Distribution in Continental United States," Crop years 1933 to 1940, inclusive. And exhibit two hereto attached and made part hereof entitled, "Wheat, Production and Disappearance, by uses, by States." That he would testify

to the accuracy of said figures and to the facts they reveal.

The plaintiff Alfred Lindauer if permitted would testify that he was a farmer residing at Chelsea, Michigan. That his occupation has been that of a farmer for over twenty-three years except for twenty-three months when he served in the Red Arrow Division in World War I. That he has been an officer and member of the Farmers Guild, National Farmers Union, and other farm organizations. That he owns and operates a 370 acre farm which is his and his family's home. That this farm is used for the production of grain, livestock, poultry, fruit, and dairy products.

That during the cropping season of 1940 and 1941 he planted, harvested, and threshed 45 acres of winter wheat for feed, family consumption and seed. That he did not market or sell any of said wheat and does not intend to. That for many years he has planted from 40 to 60 acres of winter wheat as a rotation crop and has never sold a bushel but used it exclusively for feed, family consumption, and seed.

This plaintiff would testify further that the defendant is attempting to collect a 49¢ penalty tax on 466.4 bushels or $375.74 on so-called excess wheat produced on plaintiff's farm for the year 1941. He would testify that he never received any benefit directly or indirectly or remotely from the Agricultural Adjustment Act of 1938, as amended, but that in fact he suffered a loss even beyond the so-called penalty.

This plaintiff would testify further that he made more money out of his farming operations on an average before the enactment of the AAA program than after. That the AAA has never benefited him directly or indirectly or any other farmer as far as he knows except those farmers who are on the Agricultural Department's payroll.

He would testify that unthreshed wheat cannot safely be fed to livestock such as horses or cattle. That hogs generally will not eat it in that form and to feed it to chickens would incur a great waste. That practically all the expenses and labor have been incurred before the wheat is harvested. That threshing would only cost an additional 8¢ a bushel.

This plaintiff would testify that the AAA program has been a detriment to him and the farmers and that if he is

compelled to pay this penalty it will mean a financial loss. He has never received or accepted any benefit under any of its provisions. That from his farming experiences he knows that it has not increased prices of wheat but rather decreased them. That the government used the wheat it obtained from its loaning policy to sell in competition with the farmers' wheat thus putting a ceiling on prices rather than a floor.

Finally this plaintiff would testify that if the government can take his wheat in the name of a penalty tax without paying for it he will be compelled to reduce his farming activities and curtail production of livestock, poultry, fruit, and dairy products when the nation needs them.

The plaintiff Clyde F. Snodgrass if permitted would testify that he has been a farmer all his life except the twenty months he served in World War I. That he owned and operated a 265-acre farm in High Rock, Pennsylvania, which was his and his family's home until recently. That he has quit farming because he cannot continue to farm without a financial loss under the AAA program.

That until recently he raised forty acres of wheat each year until the AAA program cut him down to thirteen acres. That the defendant is attempting to collect a 49¢ penalty tax on 301 bushels or $147.49 on so-called excess wheat for the year 1941.

That this tax is confiscatory because it is taking property by the Department of Agriculture without paying for it. He would further testify that he never received or accepted any payments directly or indirectly from the AAA and that the AAA did not increase the price of any product that he raised nor of wheat. But that it kept the price of wheat down by using the wheat it received under the loan policy and selling it in competition with the farmers' wheat.

That he would testify that all the wheat he raised for 1941 and 1942 and prior thereto was fed to poultry. He never sold any wheat. That he never cooperated with the AAA program or never intended to because it meant a financial loss. That unthreshed wheat in his part of the country has no value because of the weavel and the fly getting into it as well as the rats. That it cannot be fed to livestock. That while chickens may eat the unthreshed

wheat, there is too much waste. That practically all the expense of raising wheat is incurred up to the time it's harvested. That threshing adds only slightly to the cost.

And for the defendant to say that if the farmer had not threshed the wheat he would not have been penalized is absurd. That is confiscation just the same.

That the witness Augustine Rohr who was present in the court room if permitted to testify would have testified that he is a farmer of Stark County, Ohio. He has farmed all his life on a farm of 260 acres. That he has been penalized $730.72. That such a penalty was the same as a steal by the government. That he raised grain for livestock. That he never raised over fourteen to twenty acres. Never co-operated or never will cooperate with the AAA program.

That if he pays the penalty he will sustain a financial loss. That he never accepted a subsidy from the AAA nor does he want one. That if he is compelled to pay this penalty he will sustain a financial loss on his farming operations.

That unthreshed wheat is not economical to feed. That the AAA did not increase the price of wheat but rather put a ceiling on it. That on the whole the AAA has been a detriment to agriculture and a financial loss to the farmer.

In the District Court of the United States for the District of Columbia

No. 15347 (Civil)

KENNETH BENDER ET AL., PLAINTIFFS-APPELLANTS

v.

CLAUDE R. WICKARD, DEFENDANT-APPELLEE

Filed Mar. 31, 1943. Charles E. Stewart, Clerk.

MOTION TO AFFIRM

Appellee, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court, moves that the judgment of the District Court be affirmed.

This is a direct appeal from the final judgment of a specially constituted court of three judges, convened pursuant to the Act of August 24, 1937 (50 Stat. 752; 28 U. S. C. 380a), dismissing appellants' complaint to enjoin and restrain the appellee, the Secretary of Agriculture, from collecting the penalty under the Agricultural Adjustment act of 1938 (52 Stat. 31; 7 U. S. C. 1281 *et. seq.*) on appellants' excess wheat of the

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1941 crop and from enforcing the lien of the Government against such wheat.

The court's final judgment was entered on March 11, 1943; an appeal was allowed on March 17, 1943; and appellee was served with the appeal papers on March 18, 1943.

The judgment of the District Court should be affirmed without argument because the appeal therefrom presents no substantial question, all of the issues having been settled by previous decisions of the Supreme Court. *California Water Service Co.* v. *Redding,* 304 U. S. 252, 255.

Four principal questions were raised in the District Court: (1) that the Agricultural Adjustment Act of 1938 as amended is not within the commerce power for the reason that most of the wheat regulated under the Act, including appellants' wheat, is consumed within the states where it is produced, and for the further reason that the Act attempts to control production; (2) that the Act violates due process since appellants cannot obtain marketing cards to dispose of their wheat without paying the penalty on their excess wheat for the 1941 crop, and collection of the penalty of 49 cents per bushel on such excess wheat or enforcement of the Government's lien for the amount of the penalty would result in confiscation of appellants' property; (3) that the Act is violative of due process in that it is retroactive, the wheat having already been planted at the time

the regulation went into effect; (4) that the referendum of wheat farmers held by the Secretary of Agriculture to determine whether a national marketing quota was favored by two-thirds of the farmers who would be subject to the quota was in violation of due process in that it was held after the wheat had been planted.

All of the questions raised in this case have been decided adversely to appellants' contentions in *Wickard* v. *Filburn*, 317 U. S. 111, and *Beckman* v. *Mall*, No. 134, decided Nov. 19, 1942.[1] In fact, in the *Beckman* case the complaint was substantially identical with the complaint under consideration. In that case the District Court had dismissed the bill on the ground that no relief could be granted in the absence of the Secretary of Agriculture, an indispensable party. This Court, without motion by the Government, affirmed the dismissal of the complaint "on the authority of *Wickard* v. *Filburn* * * * without consideration of the grounds relied upon by the court below for dismissing the bill." Every reason that led to the affirmance without argument in the *Beckman* case applies equally to the case at bar.

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[1] In addition, the last-stated question, namely that the referendum violated due process because held after the wheat had been planted, is directly settled by the holding in *Mulford* v. *Smith*, 307 U. S. 38.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.[2]

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[2] At the time this case was instituted, *Wickard* v. *Filburn*, *supra*, had not been decided and the constitutional questions were still substantial. The three-judge court, accordingly, had jurisdiction to dismiss the complaint. See *California Water Service Co.* v. *Redding*, 304 U. S. 252, 255.

CHARLES FAHY,
Charles Fahy,
Solicitor General.

MARCH 29, 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 954

KENNETH BENDER, ET AL., APPELLANTS

v.

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE OF THE UNITED STATES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

OPINION BELOW

The court below rendered no opinion.

JURISDICTION

The final judgment of the district court was entered March 11, 1943. A petition for appeal was filed and allowed on March 17, 1943. Jurisdiction is conferred on this Court by Section 3 of the Act of August 24, 1937 (50 Stat. 752, 28 U. S. C., Section 380a). Probable jurisdiction was noted May 24, 1943.

QUESTIONS PRESENTED

1. Whether this case is distinguishable in any material respect from *Wickard* v. *Filburn*, 317 U. S. 111.

2. Whether the wheat quota provisions of the Agricultural Adjustment Act of 1938, as amended on May 26, 1941, are constitutional.

STATUTE INVOLVED

The statute involved is the Agricultural Adjustment Act of 1938 (52 Stat. 31, 7 U. S. C., Section 1281, *et seq.*), as amended (52 Stat. 202, 54 Stat. 727, 1211, 7 U. S. C., Section 1301; 52 Stat. 820, 7 U. S. C., Section 1302; 52 Stat. 203, 775, 53 Stat. 1125, 1126, 54 Stat. 232, 7 U. S. C., Sections 1333, 1334, 1335; 55 Stat. 203, 872, 7 U. S. C., Supp. I, Section 1340).

STATEMENT

This is an appeal from the judgment of a statutory three-judge district court convened pursuant to Section 3 of the Act of August 24, 1937 (50 Stat. 752, 28 U. S. C., Section 380a). The appellee is the Secretary of Agriculture. The appellants are wheat producers in Ohio, Kansas, Pennsylvania, and Michigan.

On April 15, 1942, appellants filed their complaint in the United States District Court for the District of Columbia (R. 1–11). They alleged that they were farmers, that they produced winter wheat, and that some of this wheat was consumed by

them and their families, some fed to livestock and poultry, some kept for seed, and some sold [1] locally (Paragraph 5). They further alleged that each had planted a greater wheat acreage than was allotted to him under the Agricultural Adjustment Act, as amended May 26, 1941, that the Secretary was claiming a lien on their wheat crops and was threatening to collect the statutory penalty of 49¢ per bushel (Paragraphs 14–16). It was alleged that their activities did not constitute or burden interstate commerce, that the greater portion of the wheat produced each year in the United States did not move in interstate or foreign commerce, and that in recent years there had not "been any excessive production of wheat" (Paragraphs 17–20). Appellants averred that the wheat provisions of the Agricultural Adjustment Act, as amended May 26, 1941, violated "the Constitution as a whole," and in particular Article I, Section 1, Article I, Section 7, Article I, Section 8, Article I, Section 9, Article IV, Section 2, the Fifth Amendment, the Seventh Amendment, the Eighth Amendment, the Ninth Amendment, the Tenth Amendment, and the Thirteenth Amendment (Paragraph 30).

[1] The tender of proof shows that some, but not all, of appellants offered to testify that they did not sell any of the wheat they produced. It is not urged, nor could it be, that this provides any reason for treating the wheat consumed on their farms differently from the wheat consumed on the farm by farmers who sell some of their wheat.

Appellants also alleged that the Secretary and his agents had acted unlawfully in conducting the referendum of wheat farmers required by the Act, and that the "whole referendum election was fraudulent and a farce" (Paragraph 21–24). This point, as well as all other contentions relating to the conduct of the Secretary (as contrasted with those relating to the validity of the statute), was expressly waived by appellants during their oral presentation to the district court and has been abandoned. See appellants' Assignment of Errors (R. 18) and Statement of Points Relied On (pp. 20–21), neither of which raise any such contentions.

Appellants prayed that the wheat provisions of the Act be held unconstitutional and that the Secretary be enjoined from collecting any penalties on their wheat.

The Secretary answered the complaint, setting up as his Second and Third Defenses (R. 15) that the Act was constitutional and that the complaint failed to state a claim upon which relief could be granted.

After the pleadings were filed in the district court, this Court in *Wickard* v. *Filburn,* 317 U. S. 111, decided November 9, 1942, upheld the validity of the wheat provisions of the Act, as amended May 26, 1941. The Court found that the statute, as applied to wheat consumed on the farm on which it was produced, was valid under the commerce clause and not violative of the due process

clause either generally or because the quotas had been fixed after the 1941 winter wheat crop had been planted. In the *Filburn* case counsel for appellants here filed a brief *amicus curiae* making substantially the same contentions as are here presented.

On November 16, 1942, this Court affirmed the judgment of a three-judge court for the District of Kansas in a case involving the same questions. *Beckman* v. *Mall,* 317 U. S. 597. Although the district court in the *Beckman* case had dismissed the complaint for lack of proper parties, this Court affirmed that decision on the merits "on the authority of *Wickard* v. *Filburn, ante,* p. 111, without consideration of the grounds relied upon by the court below for dismissing the bill." Beckman, the plaintiff in that case, is one of the plaintiffs here, and the complaint in that case was *identical* in every material respect with the complaint in the case at bar.

The present case came on for hearing in the district court on January 21, 1943. The Government requested that its Second and Third Defenses, which raised points of law and in substance constituted a demurrer, be heard in advance of the taking of evidence. The court, however, permitted counsel for the plaintiffs, appellants here, to make a statement as to what his witnesses would testify. On March 11, 1943, the court found "that the complaint presents no issue which has not been decided by the Supreme

Court of the United States in *Wickard* v. *Filburn*, 63 S. Ct. 82, and *Beckman, et al.* v. *Mall, et al.*, 63 S. Ct. 199, and the second and third defenses in the defendant's answer should be sustained." (R. 16.) The complaint was accordingly ordered dismissed.

ARGUMENT

THE COURT BELOW PROPERLY HELD THAT WICKARD *v.* FILBURN CONTROLS THE PRESENT CASE

Appellants argue (brief,[2] pp. 6, 8–9) that the *Filburn* case did not uphold the validity of the wheat quota provisions of the Agricultural Adjustment Act but decided only that Filburn, by reason of estoppel, was entitled to no relief. While appellants assert that the *Filburn* opinion contains questionable dictum (p. 8) on the constitutional issue, they "do not believe all of the language in that decision is the matured judgment of the Court" (p. 9). Appellants ask that, if the Court feels that it did pass upon the constitutional question, the *Filburn* case be reconsidered (p. 30)—in other words, that if the opinion means what it seems to say, it should be overruled.

Appellants also attack the findings of Congress as to the movement of wheat in interstate commerce, the existence of an abnormal supply of wheat, and the effect of any such supply upon interstate commerce. They offer to prove that

[2] The reference is to appellant's brief in opposition to the Government's motion to affirm.

some of the items in the stipulation of economic facts in the *Filburn* case, which supported the congressional findings, were erroneous. Appellants do not, however, at any point indicate how the corrections which they suggest would have had any effect upon the reasoning of this Court's opinion or the result reached.

We do not think it necessary in this memorandum to reargue the constitutionality of the wheat quota provisions of the Agricultural Adjustment Act. The reasoning in support of their validity is clearly set forth in the Court's unanimous opinion in the *Filburn* case, and the subject is discussed fully in the Government's two briefs in that case. The purpose of this memorandum is to show that the differences relied upon by appellants between this case and the *Filburn* case are either nonexistent or of no legal significance.

A. THE FILBURN CASE IS NOT DISTINGUISHABLE ON GROUNDS OF ESTOPPEL

It is contended by appellants that the case at bar is to be distinguished from the *Filburn* case on the ground that appellants did not receive any benefits under the Agricultural Adjustment Act of 1938, as amended (7 U. S. C., Sections 1281, 1331–1339, 1361–1368, 1388, and Supp. I, Section 1340), but, on the contrary, were injured thereby. It is asserted that the Court in the *Filburn* case did not pass upon the constitutional

questions raised, but merely held the appellant estopped from questioning the constitutionality of the Act because he had received some benefits thereunder. *Wickard* v. *Filburn* affords no foundation whatsoever for these assertions.

The *Filburn* opinion, after the introductory statement of the case, is divided into three parts. In the first part, the referendum was held to be valid. In the second part, the Court sustained the Act as a valid exercise of the power granted to the Congress under the Commerce Clause of the Constitution. The third part dealt with the argument that the Act and regulations were unconstitutional because inconsistent with the due process clause of the Fifth Amendment. In disposing of this contention, the Court said (317 U. S., at 131):

> We can hardly find a denial of due process in these circumstances, particularly since it is even doubtful that appellee's burdens under the program outweigh his benefits. It is hardly lack of due process for the Government to regulate that which it subsidizes.

The Court also declared, in dealing with the contention that the Act was being retroactively applied in violation of due process (317 U. S., at 133):

> That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that, if he could get all

> that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law. Cf. *Mulford* v. *Smith*, 307 U. S. 38.

It is upon the quoted passages that appellants base their argument that the *Filburn* case held only that Filburn personally was estopped from challenging the validity of the Act. Read in their context, however, it is clear that these passages were intended merely to show that the operation of the aggregate of federal legislation pertaining to wheat would not impose any severe burdens upon even the noncooperative farmer. No question of estoppel was raised in the *Filburn* case, and there was no showing that Filburn personally had sought any benefits available to farmers under the Federal Agricultural programs. The benefits referred to by the Court were those which would naturally be expected to inure to farmers generally from the operation of a wheat-quota system, including price-pegging crop loans, intended to increase the market price of wheat.

Appellants apparently contend that Filburn received benefits under the Act which they did not receive. Nothing in the *Filburn* record supports this suggestion. There is no basis for the statement in appellants' brief (p. 6) that "Filburn in his stipulation *erroneously* admitted that he had received benefits and higher prices for his wheat under the AAA program." The stipulation con-

tained no admission, erroneous or otherwise, that Filburn himself had received any special benefits. It did contain evidence that general market prices for wheat, supported by nonrecourse loans, were higher than they would otherwise have been, but this evidence was not connected with Filburn's activities, and would be equally applicable to all wheat farmers, including appellants. It is thus clear that appellants received neither more nor less benefits from the operation of the Act than Filburn received. Neither Filburn nor the plaintiffs in this case, all of whom were noncooperators under the program, were entitled to the loans made to cooperators[3] or to receive agricultural conservation payments under the Soil Conservation and Domestic Allotment Act, as amended (16 U. S. C., Section 590g–590q), or parity payments under Section 303 of the Agricultural Adjustment Act of 1938, as amended (7 U. S. C., Section 1303).

There is thus no more basis for appellants' assertion that Filburn was estopped by benefits he had received than there is for their statement that this Court's decision was based upon such

[3] Appellants, as well as Filburn, being noncooperators, were, of course, entitled to obtain Government loans on their excess wheat to the extent of 60 percent of the amount obtainable by a cooperator. Act of May 26, 1941 (par. 10 (c), 55 Stat. 203, 7 U. S. C., Supp. 1, Section 1340 (10) (c)). It does not appear that either Filburn or any of the appellants took advantage of this provision.

an estoppel rather than upon a determination of the constitutional issues.

B. THE CHALLENGE TO THE FACTS STIPULATED IN THE FILBURN CASE

Appellants attack the accuracy of the facts set forth in the legislative findings, and also insist that the District Court's findings of fact in the *Filburn* case[4] were based upon an erroneous stipulation submitted by the parties.

There can be little doubt that both the legislative findings and the stipulation of facts in the *Filburn* case are accurate. Indeed, many of the significant facts found and stipulated are of such common knowledge as to be subject to judicial notice without more, and most of such facts are derived from trustworthy official publications which are also judicially noticeable. For present purposes, however, we shall assume, contrary to the fact, that appellants' allegations (including those contained in the offer of proof) are true, except where the figures given demonstrate their own inaccuracy or are rebuttable by judicially noticeable material.

The primary "errors" which appellants claim to have found in the *Filburn* stipulation and the legislative findings relate to (1) the proportion of wheat moving in interstate and foreign com-

[4] The District Court had found the facts to be as set forth in the written stipulation of the parties (see Transcript of Record, No. 59, R. 119).

merce, (2) the existence of a wheat surplus, and (3) the difference between the amounts received by American farmers and the farm price of wheat sold upon the world market. We shall consider these contentions in turn.

1. *The Percentage of Wheat Moving in Interstate and Foreign Commerce.*—Neither in the *Filburn* opinion nor in the stipulation of facts was it stated that any definite percentage of the wheat crop moved in interstate commerce; indeed, we are advised that no accurate figures as to such movements are available. The Court's opinion stated merely that "commerce among the states in wheat is large and important" (317 U. S., at 125), a fact which would seem to be of common knowledge. Cf. *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. Appellants have alleged in their complaint (par. 18), argued (Br. p. 31), and offered to prove (Br. p. 51–52, 39–40A) that "only about 38.2 per cent of our total production of wheat flows in the channels of Interstate Commerce" Br. p. 39). Inasmuch as 38 percent is a substantial proportion of the crop, and comprises a tremendous quantity of wheat, the power of Congress to regulate the price and flow of wheat would not be diminished if the percentage were in accordance with appellants' contention.

But appellants' own tabulation (Br. p. 40A) demonstrates the inaccuracy of their conclusion. Appellants have determined the amount of wheat

which moves out of the state in which it is produced by adding the excess of production over consumption in the sixteen states which produce more wheat than they consume (Br. p. 39–40A). This method of calculation assumes that all wheat produced in every state which consumes more than it produces stays within the state, and that in states producing more than they consume, only the difference moves into interstate commerce. This assumption that the wheat industry is so compartmentalized that wheat never crosses state lines except in moving from a state producing a surplus to a state which consumes more than it produces is utterly baseless. This can be demonstrated from appellants' own tabulation.

In appellants' computation no state producing less wheat than it consumes is credited with shipping any of its wheat in interstate commerce. That this does not conform to the facts can be shown by using Maryland as an example. Appellants' table (Br. p. 40–A) shows that Maryland produced 7,586,000 bushels[8] (column 1) and consumed 8,412,000 bushels (column 2), 6,330,000 of this being consumed as food (column 11). But Maryland mills ground only 2,339,000 bushels (column 5). If, as appellants assume, Marylanders consumed Maryland wheat to the extent possible, they must have sent the difference between the

[8] Appellants' figures are for the average of the five-year period 1931–1932 through 1935–1936 (Br. p. 40–A).

amount consumed in Maryland as food and the amount milled in Maryland across State lines for milling. Thus, at least this amount of wheat—3,991,000 bushels—moved in interstate commerce from Maryland, although on appellants' theory no wheat moved in interstate commerce from that state.

A similar illustration will demonstrate the error in appellants' assumption that in a state producing a surplus of wheat only the amount of the surplus moves in interstate commerce. Ohio produced 41,936,000 bushels (column 1) and consumed 39,372,000 bushels (column 2). Appellants accordingly included the difference, 2,564,000 bushels (column 4), as the amount of wheat moving in interstate commerce from Ohio. But whereas Ohio mills ground only 16,122,000 bushels (column 5), Ohioans consumed as food 24,098,000 bushels (column 11). Even if, as appellants assume, Ohioans consumed only Ohio wheat, at least 7,976,000 bushels must have been shipped out of the state for milling and returned to Ohio for consumption. The amount shipped in interstate commerce from Ohio must therefore have been almost 8,000,000 bushels as contrasted with the 2,564,000 bushels included in appellants' computation.

It is obvious from these examples that appellants' computation as to the proportion of wheat moving in interstate commerce is erroneous, and that the percentage is much greater than appellants suggest.

2. *The existence of excessive supplies of wheat.*—Appellants contend that there has been no surplus or abnormal supply of wheat since 1933, and that the congressional findings and the *Filburn* stipulation are erroneous in so far as they conclude that there have been wheat surpluses. The argument is based upon statistics covering the crop years 1933–1940 (Br. pp. 41–42A, 48–49). Congress did not, however, find in Section 331 of the Act that there was an existing surplus or abnormal supply of wheat. Its findings were that both abnormally excessive and abnormally deficient supplies of wheat burdened commerce, that the provisions of the Act were necessary to minimize recurring surpluses and shortages and to provide for the maintenance of adequate reserve supplies, and that the provisions for regulation of marketings by producers of wheat "*whenever an abnormally excessive supply of such commodity exists* are necessary in order to maintain an orderly flow of wheat in interstate and foreign commerce under such conditions" (italics supplied).[8] The Act (Section 335) then provides that quotas shall be established only when the Secretary finds that the total supply (defined as carry-over plus estimated production (Section 301 (b) (16) (A))) at the beginning of any marketing year will exceed a normal year's domestic consumption and exports by more than 35 percent. Thus the Act does not assume or find that there was an excessive supply when it was

[8] See also H. Rept. 1645, 75th Cong., 2d sess., pp. 1–2, 28–34.

passed or in any particular year; it provides merely that the regulatory provisions shall become operative when and if such a supply comes into existence.

No quotas were in effect for the crop years 1938, 1939 and 1940. This case involves the quotas for the crop year 1941, the first year in which they were established.

Appellants' tabulation (Br. p. 42A) covers the crop years 1933–1940. It may be true that there were no excessive surpluses during those years—but that can hardly prove that no such excess existed in 1941. Indeed, appellants' table (Br. p. 42–A) shows that by the end of the 1940 crop year (June 30, 1941) the carry-over (Column 13) was 411,-000,000 bushels, much greater than in any of the preceding years; the total amount consumed and exported during the crop year 1940 was 707,-000,000 bushels, which was approximately the average for the preceding seven years (Column 5). Thus on the evidence tendered by appellants there was a carry-over of approximately 58 percent of the consumption and exports during the preceding year when the 1941 crop year began, a percentage much higher than that existing during any of the other years covered by appellants' tabulation. Appellants' figures thus do not prove that there was no surplus for the year 1941 but the contrary. They are entirely consistent with the stipulation in the *Filburn* case and obviously do not contravene the congressional findings, inasmuch as Con-

gress made no finding as to the existence of a surplus in any particular year.[7]

3. *Comparison of American and world prices.*—Appellants claim (Br. pp. 4, 8, 49) that the stipulation of facts in the *Filburn* case erred in stating that the consequence of the wheat program was to give farmers a price of $1.16 per bushel on their wheat as contrasted with the world price of approximately 40¢.[8] It is contended that "this stipulation was incorrect and untrue at both ends" (Br. p. 8), and that two of appellant-farmers would testify that the stipulation was based upon "fake statistics" (Br. pp. 45–47). Neither the stipulation in the *Filburn* case nor this Court's opinion (317 U. S., at 126) stated that the farm price was raised to $1.16 per bushel. They did

[7] Appellants' argument (Br. pp. 4–5) that the Department of Agriculture statistics as to the existence of surpluses ignore the increase of population has no basis. The figures employed by the Department are based upon actual consumption and exports. The failure of these figures to attribute the same per capita consumption of wheat to each inhabitant of the United States in 1935 as in 1900 is not due to Departmental caprice or stupidity, as appellants imply, but to an actual decline in the per capita consumption of wheat. This has not been caused by an insufficient wheat supply, but by changes in dietary habits.

[8] The *Filburn* stipulation stated (Transcript No. 59, R. 71): "For the 1941 crop, the wheat conservation and parity payments again amount to 18 cents a bushel but the loan has been raised to 85 percent of parity and is estimated to average about 98 cents a bushel. Consequently, during 1941 cooperators in the wheat program will receive an average price on the farm approximating parity or about $1.16 a bushel, as compared with a price of about 40 cents a bushel if the wheat were sold on the basis of a world market."

state, accurately, that the *cooperating* farmer could receive an average price of $1.16 per bushel. This amount was composed of the nonrecourse [9] loan of 98¢ per bushel, which appellants concede (Br. pp. 4, 49) to have been available to each cooperator, and the parity and soil conservation payment of 18¢ per bushel which was also available to cooperators. Appellants claim that the domestic price of wheat during the period here in question was 85¢ to 90¢ per bushel (Br. p. 4). It may be conceded that this was the general price available to noncooperating farmers and to cooperators if they sold their wheat on the market without taking advantage of the Government loan. This fact is not inconsistent with the statement in the Filburn stipulation that cooperating farmers could obtain $1.16 per bushel for their wheat. And, indeed, it would seem obvious that the noncooperating farmers were able to obtain 85¢ to 90¢ for the wheat they sold only because of the price-pegging effect of the 98¢ loan available to the farmers who cooperated.

Appellants assert (Br. pp. 8, 49) that the stipulation that the world price was 40¢ per bushel during the period was untrue. To support this charge they quote prices at Winnipeg, Canada, as 64¢–72¢ per bushel and on the Liverpool market [10] at 84¢–92¢. Assuming these figures to be accurate,

[9] See Section 302 (h).

[10] We are advised that since the war began in 1939 the Liverpool market has been closed, and so far as we know there were no published Liverpool price quotations for the period in question.

they represent prices at these markets and not prices to the farmer. Rail and ocean freight rates and the cost of insurance must be subtracted from these amounts to ascertain the return to the farmer, and these costs are, of course, considerable in so far as shipments to Europe during the war are concerned.[11] Thus the prices upon which appellants rely are not comparable to the farm price of 40¢ referred to in the Filburn stipulation. Moreover, in Canada wheat prices are not free, but, as this Court noted in the *Filburn* case (317 U. S., at 126n), are controlled by the Canadian Wheat Board.[12] It is thus apparent that appellants' figures do not support the grave charge that the 40¢ figure was untrue.

That the farm price on the world market was approximately 40¢ per bushel is indicated by judicially noticeable publications. The farm price

[11] The North Atlantic UK Freight Conference Schedule of Minimum Rates and Tariff Rules (No. 38, page 0), *War Emergency Rates*, filed with the Maritime Commission on May 25, 1940, and still in effect, shows a rate of 13 s. per quarter (approximately 8 bushels) for wheat shipments to Great Britain. At the rate of exchange in effect in June 1941, this amounted to 32.78¢ per bushel. Proportional rail rates from Chicago to New York for grain for export were 17.5¢ per hundred pounds or 10.5¢ per bushel of 60 pounds. See findings of the Interstate Commerce Commission in *Grain Proportionals, Ex-Barge to Official Territory*, 246 I. C. C. 353, 365, printed in the Transcript of Record in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, No. 175, this Term, after R. 18.

[12] See 4 George VI, c, 25; 6 George VI, c. 10; Patton, *Wartime Wheat Policy in Canada*, 24 Journal of Farm Economics 772 (November 1942).

in the United States in June 1941 was 83.1¢.[13] During the same month "the export indemnity which would be required to export wheat to Europe" was "about 41¢ from the Gulf" of Mexico.[14] This meant that the United States price of 83.1¢ had to be reduced, by way of Government subsidy, 41¢ before American wheat could be sold in the world market. This would indicate a comparative world price of 42¢.

Although, for the reasons stated, we believe that appellants' challenge to the figures set forth in the record is without foundation, and not even supported by appellants' own offer of proof, we do not mean to imply that the size of the discrepancy between the return to American farmers and the world price is material to the constitutionality of the Agricultural Adjustment Act. Even appellants' figures show that the cooperating American farmer secured a higher return than the world price. If the Act is a reasonable means of attempting to control interstate wheat prices and recurrent surpluses and shortages affecting interstate commerce, its validity does not depend on the amount of the difference between American and world prices, or indeed, upon whether there is any such difference at all.

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[13] See United States Department of Agriculture, Agricultural Marketing Service, *Midmonth Local Market Price Report* (June 1941), p. 5.

[14] United States Department of Agriculture, Bureau of Agricultural Economics, *The Wheat Situation* (June 1941), p. 7.

Even more irrelevant to the constitutionality of the statute is its effect upon these appellants. Statutes, especially those dealing with a national problem of such large general importance, are not unconstitutional merely because they cause some persons financial injury (see *Wickard* v. *Filburn*, 317 U. S., at 129). Appellants assert (Br. pp. 3, 6) only that they received no benefits from the program, that, as taxpayers called upon to pay for it, they sustained a loss, and, of course, that they were injured by the imposition of the 49-cent penalty. Their loss as taxpayers, in common with all other federal taxpayers, does not give them standing to challenge the validity of the Act. *Frothingham* v. *Mellon*, 262 U. S. 447. The loss in penalties for not conforming to the statutory scheme, if in the end such losses occurred, obviously does not make the statute invalid; penalties generally have an injurious effect upon persons who do not comply with the law.

We have discussed, at perhaps unduly great length, the factual differences which appellants claim to exist between this case and the *Filburn* case, in order to demonstrate that the distinctions suggested are not even supported by the evidence tendered by appellants themselves. We think it apparent, however, that none of these distinctions has any relationship to the bases of this Court's reasoning in the *Filburn* case. Clearly the exact proportion of wheat moving in interstate com-

merce, the existence of prior surpluses, the relation between American and world prices, or the damage to individual farmers, are not controlling of the question with which this Court was primarily concerned—the need for regulating wheat consumed on the farm in order to carry out the plan of regulating trade at stabilized prices.[15]

For these reasons we submit that none of the distinctions suggested is of consequence, and that the district court properly held that even if appellants proved the facts set forth in their tender of evidence the reasoning of the *Filburn* decision was controlling. It was therefore proper for the district court to dismiss the complaint without the taking of oral testimony.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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Solicitor General.

TOM C. CLARK,
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Special Assistants to the Attorney General.

MAY 1943.

[15] This also seems to be the point primarily relied upon by appellants in their argument on the merits (Br. pp. 10–20, 31–33).

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 954. BENDER ET AL. *v.* WICKARD, SECRETARY OF AGRICULTURE. Appeal from the District Court of the United States for the District of Columbia. Argued June 1, 1943. Decided June 7, 1943. *Per Curiam:* The judgment is affirmed on the authority of *Wickard* v. *Filburn*, 317 U. S. 111. *Mr. William Lemke*, with whom *Messrs. Robert H. McNeill, Louis M. Day*, and *T. A. Billingsly* were on the brief, for appellants. *Solicitor General Fahy*, with whom *Assistant Attorney General Tom C. Clark* and *Messrs. Robert L. Stern, John S. L. Yost*, and *W Carroll Hunter* were on the brief, for appellee.